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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. ____

UNION CAMP CORPORATION,
Petitioner,

vs.

JAMES E. DYAL, JR., et al., JOHN M. MURRELL, et al., and LEON A. WILSON, II, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

Subject Index

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement of the Case 4

(a) Nature of the case and course of proceedings below 4

(b) Factual background 5

Reasons for Granting the Writ 8

I. The Court of Appeals Erred in Holding That an Agent's Compromise Settlement of a Pending Action Which Provides for the Conveyance of Real Property Must Be in Writing Unless Ratified by the Principal 8

II. The Holding of the Court of Appeals That Attorneys with Written Authority from Their Clients "To Take Such Steps As You Deem Necessary to Protect Our Interests in This Litigation" Do Not Have the Authority to Enter into a Compromise Settlement Which Provides for the Conveyance of Real Property Is Contrary to Georgia Law 13

A. Under Georgia Law, an Attorney under a General Retainer Has the Authority to Enter into a Compromise Agreement of a Pending Action Which Provides for the Conveyance of Land 14

B. The Stipulation Agreement Was Clearly an Agreement in Relation to the Cause Which Disposed of the Issues in the Pending Action 21

III. Contrary to the Strong Policy of the Law to Encourage the Compromise and Settlement of Lawsuits, the Decision of the Court of Appeals Imposes an Unnecessary Obstacle to the Compromise and Settlement of Actions Involving Real Property in Georgia 23

IV. The Court of Appeals' Failure to Accept the Findings of the District Court in Patent Disregard of Rule 52, Federal Rules of Civil Procedure, Is So Grave a Departure from Accepted Judicial Proceedings As to Call for an Exercise of this Court's Power of Supervision 25

Conclusion 26

Index to Appendices

Appendix A—Opinion of the United States Court of Appeals for the Fifth Circuit Dated and Entered March 24, 1972 ..... A1

Appendix B—Order of the United States Court of Appeals for the Fifth Circuit Dated April 28, 1972, Denying Petition for Rehearing A22

Appendix C—Unreported Opinion and Judgment of the United States District Court, Southern District of Georgia Dated March 2, 1971 ..... A23

Appendix D—Stipulation Agreement of November 5, 1969, Between Union Camp Corporation and J. Edgar Dyal on Behalf of Owners of the Leasehold Premises A58

Appendix E—Letter of September 5, 1969, from J. Edgar Dyal and His Children Retaining Attorneys to Represent Them in the Pending Suit A59

Table of Authorities Cited

CASES

Bankers Fidelity Life Insurance Co. v. *O'Barr*, 108 Ga. App. 220, 132 S.E.2d 546 (1963) 12

Boswell v. *Gillen*, 131 Ga. 310, 62 S.E. 187 (1908) 9, 11, 12, 13

Cia Anon Venezolana De Navegacion v. *Harris*, 374 F.2d 33 (5th Cir. 1967) 21

Collins v. *Collins*, 165 Ga. 198, 140 S.E. 50 (1927) 24

Cook v. *Wier*, 185 Ga. 418, 195 S.E. 740 (1938) 22

Corbin v. *Goepper*, 184 Ga. 559, 192 S.E. 24 (1937) 22

Davenport v. *Davenport*, 218 Ga. 475, 128 S.E.2d 772 (1962) 22

Davis v. *First National Bank of Blakely*, 139 Ga. 702, 78 S.E. 190 (1913) 14, 15, 18

Dean v. *Jackson*, 219 Ga. 552, 134 S.E.2d 601 (1964) 16-17, 23

Elliott v. *Elliott*, 184 Ga. 417, 191 S.E. 465 (1937) 17, 18

Erie R.R. v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) 21

Evans v. *Brooke*, 182 Ga. 197, 184 S.E. 800 (1936) 18, 22

Fluellen v. *Campbell Coal Co.*, 54 Ga. App. 355, 188 S.E. 54 (1936) 22

Fulford v. *Fulford*, 225 Ga. 9, 165 S.E.2d 848 (1969) 8-9, 10, 11, 12, 22

Galfas v. *Ailor*, 81 Ga. App. 13, 57 S.E.2d 834 (1950) 22

Ganns v. *Worrell*, 216 Ga. 512, 117 S.E.2d 533 (1960) 22

Glisson v. *Burkhalter*, 31 Ga. App. 365, 120 S.E. 664 (1923) 12

Hatcher v. *Georgia Farm Bureau Mutual Insurance Co.*, 112 Ga. App. 711, 146 S.E.2d 535 (1965) 20, 22

Herndon v. *Herndon*, 227 Ga. 781, 183 S.E.2d 386 (1971) 12-13
Howell v. *Howell*, 188 Ga. 803, 4 S.E.2d 835 (1939) 22
Ingalls Iron Works Co. v. *Ingalls*, 177 F.Supp. 151 (N.D.Ala. 1959) 21
J. Kahn & Co. v. *Clark*, 178 F.2d 111 (5th Cir. 1949) 23, 24
Lovelace v. *Lovelace*, 179 Ga. 822, 177 S.E. 685 (1934) 22
Manis v. *Genest*, 210 Ga. 16, 77 S.E.2d 525 (1953) 22
McCoy v. *McSorley*, 119 Ga. App. 603, 168 S.E.2d 202 (1969) 19
Parker v. *Riley*, 21 Ga. 427 (1856) 11
Pesso v. *Poulos*, 74 Ga. App. 288, 39 S.E.2d 702 (1946) 12
Petty v. *Complete Auto Transit, Inc.*, 215 Ga. 66, 108 S.E.2d 697 (1959) 17, 19, 23
Pike v. *Andrews*, 210 Ga. 553, 81 S.E.2d 817 (1954) 16, 17, 18, 19, 20, 23
Preston v. *Curtiss National Bank*, 410 F.2d 367 (5th Cir. 1969) 25
Reece v. *McCormack*, 188 Ga. 665, 4 S.E.2d 575 (1939) 22
United States v. *National Association of Real Estate Boards*, 339 U.S. 485, 70 S.Ct. 711, 94 L.Ed. 1007 (1950) 25
United States Fidelity & Guaranty Co. v. *Ryder Truck Rental, Inc.*, 405 F.2d 621 (5th Cir. 1969) 25
Wade v. *Powell*, 31 Ga. 1 (1860) 16, 17

RULES

Fed. R. Civ. P.:
Rule 52 ..... 25, 26

Statutes

28 U.S.C.:
Section 1254 2
Section 1655 ..... 4, 7
Section 2201 4
Section 2202 4
Code of Georgia of 1862, pt. I, tit. 5, ch. 7, §382 14
Code of Georgia of 1862, pt. I, tit. 5, ch. 7, §383 15
Code of Georgia of 1933 §4-105 3
Code of Georgia of 1933 §9-605 3
Code of Georgia of 1933 §9-606 3
Code of Georgia of 1933 §20-401 3
Georgia Code Annotated §4-105 3
Georgia Code Annotated §9-605 ..... 4, 20, 21, 22, 23
Georgia Code Annotated §9-606 4
Georgia Code Annotated §20-401 3

Other Authorities

8 Cyclopedia of Law and Procedure, 513 12
5 Encyclopedia of Georgia Law, *Compromise and Settlement*, §2 24

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Union Camp Corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 24, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not, as of this date, been reported. A copy of the slip opinion as received from the court is attached to this Petition as Appendix A. The opinion of the Court of Appeals for the Fifth Circuit dated April 28, 1972, denying a Petition for Rehearing is attached to this Petition as Appendix B. The unreported opinion and judgment by the Honorable W. A. Bootle, United States District Judge, for

the United States District Court, Middle District of Georgia, sitting by designation, dated March 2, 1971, is attached to this Petition as Appendix C.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was entered on March 24, 1972. Thereafter on April 6, 1972, a Petition for Rehearing was filed and was denied on April 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), which provides as follows:

> 28 U.S.C. §1254. Court of Appeals; certiorari; appeal; certified questions. Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

QUESTIONS PRESENTED

At issue is the validity of a stipulation agreement entered into between Union Camp Corporation and J. Edgar Dyal, as representative of his family, and signed by their attorneys, which provided *inter alia* for the acceleration of the date of the exercise of an option to purchase certain real property. The judgment of the District Court, which upheld the validity of the stipulation agreement, was reversed in part by the Court of Appeals. The Court of Appeals held that an attorney, under Georgia law, does not have the authority to enter into such a compromise settlement of his client's action, and that, absent ratification, a verbal compromise settlement of a pending suit providing for the conveyance of real property is invalid. Both holdings are clearly contrary to Georgia law and raise questions of great moment to any litigant in federal court de-

sirous of entering into a compromise settlement of a pending action involving real property in Georgia.

In particular, the questions presented for review by this Court are:

1. Whether the Court of Appeals erred in holding that, under Georgia law, an agent's compromise settlement of a pending action providing for the conveyance of real property must be in writing unless ratified by his principal.

2. Whether the Court of Appeals erred in its holding that under Georgia law, attorneys with written authority from their clients "to take such steps as you deem necessary to protect our interests in this litigation," do not have the authority to enter into a compromise settlement of the suit which provides for the conveyance of real property where interests and rights in that property are clearly at issue.

STATUTES INVOLVED

The applicable statutes are Sections 20-401, 4-105, 9-605, and 9-606 of the 1933 CODE OF GEORGIA, also published in the GEORGIA CODE ANNOTATED. They provide, in pertinent part, as follows:

GEORGIA CODE ANNOTATED §20-401:

"20-401. Obligations which must be in writing. —To make the following obligations binding on the promisor, the promise must be in writing, signed by the party to be charged therewith, or some person by him lawfully authorized, viz:

. . .

4. Any contract for sale of lands, or any interest in or concerning them."

GEORGIA CODE ANNOTATED §4-105:

"4-105. Agency created, how; agents of corporation.—The act creating the agency shall be executed with the same formality (and need have no more) as the law prescribes for the execution of the act for which the agency shall be created. . . ."

GEORGIA CODE ANNOTATED §9-605:

"9-605. Authority to bind clients; administration of oaths.—Attorneys have authority to bind their clients in any action or proceeding, by any agreement in relation to the cause, made in writing. . . ."

GEORGIA CODE ANNOTATED §9-606:

"9-606. Limitation on authority.—Without special authority, attorneys cannot receive anything in discharge of a client's claim but the full amount is cash."

STATEMENT OF THE CASE

(a) Nature of the case and course of proceedings below.

The action was brought pursuant to 28 U.S.C. §§1655, 2201, and 2202 for a declaratory judgment and other appropriate relief upon Union Camp Corporation's claim to continued possession and timber rights under a lease and option to purchase certain real property located in Wayne and Appling Counties, Georgia. Union Camp sought and obtained temporary restraining orders against J. Edgar Dyal's prosecution of an action then pending in the United States District Court for the Southern District of Florida and of another action then pending in the Superior Court of Appling County, and from otherwise interfering with Union Camp's possession until the rights of the parties could be determined in the United States District Court for the Southern District of Georgia.

Following three extensions of time for filing of defensive pleadings and continuation of the preliminary injunctions by stipulation of the parties and order of the Court, the attorneys for the parties executed, on November 5, 1969, a stipulation, which is attached to this Petition as Appendix D, which provided "that all issues between the parties be settled by and through the purchase by Plaintiff from the Defendants of full fee simple title to all the lands. . . ." At the time stated in the settlement agreement, Union Camp tendered performance which was accepted by one of the titleholders but refused by J. Edgar Dyal on behalf of the others.

Upon motion of Union Camp that the stipulation agreement be made the order and judgment of the Court, an evidentiary hearing was held before Honorable W. A. Bootle sitting without a jury. After three and one-half days of hearing, the Court rejected the contentions of defendants and directed specific performance of the settlement agreement.

On March 24, 1972, the Court of Appeals affirmed the judgment of the District Court as to J. Edgar Dyal, but reversed the judgment of the District Court as to the other titleholders, holding them not to be bound by the signed stipulation agreement. The petition for rehearing was denied on April 28, 1972.

(b) Factual background.

The case arises out of a controversy between citizens of different states, between J. Edgar Dyal and the members of his family on the one hand and Union Camp Corporation on the other. The case involves approximately 39,400 acres of land located in Wayne and Appling Counties, Georgia. This land is held by Union Camp Corporation under a lease with option to purchase as the successor to Union Bag and Paper Company, which leased approxi-

mately 29,000 acres of the land from Mr. Dyal and 10,400 acres from the Citizens and Southern National Bank, as Trustee. The leases were entered into on December 30, 1941, for a term of 99 years with an option to purchase the lands upon the death of J. Edgar Dyal at a price of $15.00 per acre.

During the years which followed the making of the leases, Mr. Dyal made gifts to members of his family of interests in the land on numerous occasions. Each deed recited that the interest conveyed was subject to the lease and option to purchase of Union Bag and Paper Company. These gifts resulted in frequent changes in the holders of the record title, and of the persons entitled to receive the rental payments from the lands. Mr. Dyal reserved to himself all payments due under the leases for fuel wood during his lifetime.

The difficulty which led to the instant action arose from the delay of Union Camp Corporation in complying with the request of J. Edgar Dyal to remove resinous stumps from the lands as fuel wood and pay him 1/2 the market price per cord. Later Union Camp offered J. Edgar Dyal a letter contract dated May 22, 1969, covering the harvesting of the stumps which was rejected.

By letter of May 29, 1969, Union Camp Corporation was advised that Mr. Dyal had decided to exercise the option provided by the contract to "declare the entire lease terminated and reenter and take possession of the land and premises." (App. C at A29). On June 5, 1969, Mr. Dyal filed suit in the Dade County, Florida Court for cancellation and termination of the lease agreement and for an accounting. On August 3, 1969, Mr. Dyal met with his two sons and two daughters and discussed the actions he was taking against Union Camp. He secured quitclaim deeds from them of their interests in the lands involved in the Appling County

suit and their agreement to settle that action. (App. C at A29).

Union Camp Corporation removed the suit brought against it in the State Court of Florida to the United States District Court for the Southern District of Florida, Miami Division, on June 27, 1969, and, on August 28, 1969, filed the complaint in this action under U.S.C. §1655 seeking a declaration of its rights and to enforce its claim to the land and timber thereon. It sought and obtained a temporary restraining order enjoining Mr. Dyal from prosecuting his action in the district court in Florida, and the cross claimants from prosecuting their claims in the Superior Court of Appling County, Georgia, until the rights of the parties had been determined by this court. The letter from J. Edgar Dyal and his children retaining attorneys to represent them in this action is attached to this Petition as Appendix E.

On November 5, 1969, the representatives of the parties and their then counsel of record in this case met in Miami, Florida, in the offices of one of the attorneys of record for J. Edgar Dyal and all other defendants. Mr. Dyal was present, and stated that he could speak for all titleholders of the land (the only one which was not a member of his family was his housekeeper of many years). The stipulation, the subject of this action, was then signed. All present believed that it settled all issues in the pending suit.

After the conference was over and the conferees had dispersed, Mr. Dyal became dissatisfied with the stipulation and notified his counsel he did not intend to carry it out, and personally so notified plaintiff's representatives two days later. Notwithstanding the stipulation of settlement, the defendants filed defensive pleadings on Novem-

ber 16, 1969, including a motion to dismiss for failure to state a claim upon which relief could be granted.

On December 15, 1969, the date set for performance of the settlement agreement, Union Camp made a proffer of deeds prepared by its counsel for execution by the defendants. Union Camp also made the tender of the $900,000.00 provided by the settlement which was well in excess of the option price of the property and which was refused by all of the defendants except Willie Eason Dyal, who accepted her proportionate share of the proceeds of the settlement agreement. On December 29, 1969, Union Camp Corporation moved to have the stipulation agreement made the order and judgment of the court which was granted by order and judgment of the court dated March 2, 1971.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Erred in Holding That an Agent's Compromise Settlement of a Pending Action Which Provides for the Conveyance of Real Property Must Be in Writing Unless Ratified by the Principal.

J. Edgar Dyal acting in his own behalf as a titleholder and possessing, as the Court of Appeals held, actual authority of the other titleholders authorized the attorneys to sign the stipulation on behalf of all the defendants. The Court of Appeals determined that only Mr. Dyal was bound by the stipulation, reasoning that such an agreement was required to be in writing and, although Mr. Dyal had actual authority, he did not possess *written* authority from the other defendants and under Georgia law they were not bound by the stipulation.

The compromise settlement of a pending suit which provides for the conveyance of real property is not required to be in writing. *Fulford* v. *Fulford*, 225 Ga. 9, 165

S.E.2d 848 (1969). The Court of Appeals for the Fifth Circuit misinterpreted the decision of the Supreme Court of Georgia in *Fulford* v. *Fulford*, on this point, and, as a result, failed to apply its principles correctly to the case *sub judice*. *Fulford* involved a suit for the cancellation of a warranty deed and security deed on certain property. While suit was pending all parties with their counsel made an agreement in settlement of the litigation which provided *inter alia* for the reconveyance of the property, the cancellation of the security deed, the sale of the property, the method of sale and payment, the handling of the proceeds from the sale of the land, and the release of various interests in other properties not the subject of the pending litigation. Upon the failure of the defendants to perform according to the terms of the agreement, plaintiffs brought an action for cancellation of the warranty deed and security deed and for injunctive relief.

The defendants demurred contending that the alleged compromise and settlement was too vague, general and indefinite to be enforceable and that it involved the conveyance of real property and, therefore, was required to be in writing. The court found the agreement to be sufficiently definite to be enforceable. Then, addressing itself to the question of whether the agreement was otherwise enforceable, quoted from the decision of the Georgia Supreme Court in *Boswell* v. *Gillen*, 131 Ga. 310, 62 S.E. 187 (1908):

> "Where an agreement for the compromise of a pending cause is made by a party and his counsel on the one hand, and by the counsel of the opposite party and ratified by this client, whereby one of the parties is to do certain acts, such agreement upon performance or offer to perform according to its terms within a reasonable time, becomes binding on the parties, and puts an end to the original subject-matter of the contro-

> versy. . . *Such an agreement need not be in writing*. . . The rule of the court, that no consent between attorneys or parties, if denied, will be enforced if not in writing, has no application to an oral agreement and compromise of a pending suit. . . ." 225 Ga. at 17, 165 S.E.2d at 854 (emphasis supplied).

The Court in *Fulford* did not characterize the situation before it as one in which there was a ratification or in which the validity of an oral compromise of a pending suit was dependent upon the ratification of the compromise. The above quotation was the court's sole reference to a ratification. In the only other statement which sheds light on this issue, the court simply stated that "while the instant suit was pending, all the parties with their counsel met in the courtroom of the Wheeler County courthouse and made an agreement which was an accord and satisfaction (compromise settlement) of the action. . . ." 225 Ga. at 14, 165 S.E.2d at 852.

In its analysis of *Fulford* the Court of Appeals stated: "The defendant demurred to this court on the ground that the alleged compromise was not in writing. The court held that the agreement was not void, because it was 'an agreement for the compromise of a pending cause. . . made by a party and his counsel on the one hand, and by the counsel of the opposite party and ratified by his client. . . .' " (App. A at A14-A15). The analysis of *Fulford* by the Court of Appeals resulted in its conclusion that an oral compromise agreement, providing for the conveyance of real property, is valid only if there has been a subsequent ratification of the agreement. That conclusion is an incorrect interpretation of the court's holding. The court in *Fulford* did not hold that a verbal compromise of a pending suit which involved the conveyance of real property must be in writing unless ratified. Instead, it reiterated established

Georgia law that upon ratification the agreement became binding on the parties, and put an end to the original subject-matter of the controversy and that a compromise settlement of a pending suit need not be in writing even though it provides for the conveyance of an interest in land.

Boswell v. *Gillen, supra,* relied upon by the court in *Fulford* supports this position. The *Boswell* decision consisted solely of nine syllabi. The *Fulford* court quoted three of these omitting the citations supporting each. The following is the full quotation of the first two syllabi from *Boswell:*

> "1. Where an agreement for the compromise of a pending cause is made by a party and its counsel on the one hand, and by the counsel by the opposite party and ratified by his client, whereby one of the parties is to do certain acts, such agreement upon performance or offer to perform according to its terms within a reasonable time, becomes binding on the parties, and puts an end to the original subject-matter of the controversy. *Parker* v. *Riley,* 21 Ga. 427.
>
> 2. Such an agreement need not be in writing. 8 Cyc. 513. 131 Ga. at 310-311, 62 S.E. at 187."

The separation of the two issues, the effect of the ratification of a compromise agreement and the validity of an oral compromise agreement, is apparent from the above quotation. Moreover, the authority cited in support of each syllabus confirms this disjunction. The decision of *Parker* v. *Riley,* 21 Ga. 247 (1856), cited as authority for the first syllabus dealt only with the effect of a compromise settlement on a pending suit. The court in *Parker* v. *Riley* held that "[t]he contract of compromise, as far as we understand it, was a complete contract, and we know of no rule of law which places it in the power of

either party to a compromise, to disregard it, if it was full and final between the parties, as to the subject matter of the controversy." *Id.* at 430.

Subsequent decisions citing *Boswell* confirm this interpretation. The decision of *Glisson* v. *Burkhalter*, 31 Ga. App. 365, 120 S.E. 664 (1923), cites *Boswell* for the proposition that "a settlement of pending litigation should put an end to the subject-matter of the controversy." *Id.* at 366, 120 S.E. at 665. The court in *Pesso* v. *Poulos*, 74 Ga. App. 288, 39 S.E.2d 702 (1946), phrased the first holding of *Boswell* thusly: "The parties regarded the issue as doubtful enough to make it the subject-matter of a compromise whether it actually was doubtful or not, and are bound thereby." *Id.* at 289, 39 S.E.2d at 703. Expressing the *Boswell* holding in slightly different terms, the court in *Bankers Fidelity Life Insurance Co.* v. *O'Barr*, 108 Ga. App. 220, 222, 132 S.E.2d 546, 548 (1963), stated: "Where suit is pending, either of the parties to the case is entitled to a final judgment based on the terms of the agreement of settlement so as to render certain the termination of the case."

The court in *Boswell* cited as authority for its second syllabus CYCLOPAEDIA OF LAW AND PROCEDURE, volume 8, page 513 which provides: "In the absence of statutory provisions requiring it, a compromise agreement need not be in writing." The *Boswell* court's reliance on this general statement of law clearly indicates that the validity of the compromise was in no way dependent upon the subsequent ratification of the agreement.

There is no indication that the court in *Fulford* v. *Fulford* deviated from the rule announced in *Boswell* by requiring ratification of an oral compromise settlement providing for the conveyance of land. In fact, the viability of the *Boswell* rule is confirmed by the only Georgia decision subsequent to *Fulford* to address the issue. *See Herndon* v.

Herndon, 227 Ga. 781, 183 S.E.2d 386 (1971). *Herndon* involved an oral settlement agreement of a divorce action which provided for the conveyance of real property. The court held that notwithstanding the fact that the agreement involved an interest in land which under the statute of frauds would require it to be in writing, "[t]he parties to a pending lawsuit may by oral agreement compromise and settle the same, which will bind them although not reduced to writing. *Boswell* v. *Gillen*, 131 Ga. 310 (62 S.E. 187.)" *Id.* at 783-84, 183 S.E.2d at 388.

Based upon *Boswell* v. *Gillen* and its progeny, there can be no doubt that under Georgia law a parol compromise agreement of a pending suit is valid even though it may provide for the conveyance of real property. However, the Court of Appeals for the Fifth Circuit, without authority, imposed the additional requirement that the agreement be ratified. The decision, then, is at variance with Georgia law on this issue and places in jeopardy the policy of the voluntary settlement of lawsuits.

II. The Holding of the Court of Appeals That Attorneys with Written Authority from Their Clients "to Take Such Steps As You Deem Necessary to Protect Our Interests in This Litigation" Do Not Have the Authority to Enter into a Compromise Settlement Which Provides for the Conveyance of Real Property Is Contrary to Georgia Law.

The Court of Appeals held that the stipulation agreement was not binding on the defendants other than Mr. J. Edgar Dyal for the reason that the attorneys had no authority to make such an agreement on behalf of their clients.

A. Under Georgia Law, an Attorney under a General Retainer Has the Authority to Enter into a Compromise Agreement of a Pending Action Which Provides for the Conveyance of Land.

The broad, common law authority of attorneys under Georgia law is expressed in the case of *Wade* v. *Powell*, 31 Ga. 1 (1860), in which the court approved the power of an attorney to refer a case to binding arbitration without the consent of his client. On this issue, the court concluded: "And why should not this be so? An attorney may confess a judgment against his client, and this involves every thing [sic]". *Id.* at 22.

The common law authority of an attorney under a general retainer was later codified in Code of Georgia of 1862, pt. I, tit. 5, ch. 7 §382, which provided:

> "They have authority to bind their clients in any action or proceeding, by any agreement in relation to the cause made in writing, and in signing judgments, entering appeals, and by an entry of such matters when permissible on the dockets of the Court, but they cannot take affidavits, required of their clients, unless specifically permitted by law."

The court in *Davis* v. *First National Bank of Blakely*, 139 Ga. 702, 78 S.E. 190 (1913), which involved the authority of an attorney to enter into a compromise settlement of an action against the instructions of his client which were known to the opposing party and his counsel, affirmed the common law origin of the statute. The court stated:

> "This section has been in each code since the first.... It did not originate from a legislative enactment, but was a codification of the rule previously existing, and

> arising from the decisions of courts. . . . This section did not confer upon attorneys any new authority, but stated in a terse form the pre-existing general rule derived from the sources to which the codifiers were authorized to look. To take such a general rule and slavishly adhere to its letter, without looking to its spirit and meaning, would be substantially to violate the rule in endeavoring to adhere to it." *Id.* at 703-04, 78 S.E. at 191.

The common law authority of attorneys to bind their clients in agreements in relation to the cause was not without limitation. The first code in a codification of prior case law provided that "[w]ithout special authority attorneys cannot receive anything in discharge of a client's claim but the full amount in cash." Code of Georgia of 1862, pt. I, tit. 5, ch. 7, §383. An early common law limitation on an attorney's authority to bind his client by agreement in relation to the cause was discussed in *Davis* v. *First National Bank of Blakely*, *supra*. The court reasoned that the statute

> does not mean that when a client employs an attorney to bring or defend a suit, it ceases to be the client's litigation, that he has no power to say whether he will litigate or compromise his suit, and that the attorney becomes the owner or absolute master of the litigation, so as to be able to sell or give away his client's property rights by contract, *in spite of his client.* 139 Ga. at 710, 78 S.E. at 194. (emphasis supplied).

The restrictions imposed upon the authority of attorneys by *Davis* would appear to preclude an attorney's authority to sell his client's property. However, the decision has been limited to a situation in which opposing counsel knew that the attorney was entering into an agreement against

the instructions of his client. *See Pike* v. *Andrews*, 210 Ga. 553, 81 S.E.2d 817 (1954).

In its most recent pronouncement on the authority of attorneys under a general retainer, the Supreme Court of Georgia in *Dean* v. *Jackson*, 219 Ga. 552, 134 S.E.2d 601 (1964), stated:

> The scope of an attorney's authority when retained to prosecute or defend a pending case, is determined by the terms of his contract of employment, and the instructions given by his client, but where, as in the instant case, there is no express restriction upon his authority the same is measured by the principles applicable to the relationship of attorney and client. His discretion in the management and direction of his client's case is then very broad, indeed, termed in the text of Corpus Juris Secundum, plenary (complete, absolute, unqualified). "In proceedings before a court of record this apparent authority of an attorney is so broad, so far as the court and opposing parties are concerned, as to have been characterized as plenary in nature." 7 CJS 899, Attorney and Client, §80. The same language as descriptive of an attorney's implicit authority is found in In re Level Club, (D.C.N.Y.), 46 F2d 1002, 1003: "The apparent authority of attorneys in any proceeding before the court is plenary so far as the court and the opposing parties are concerned, for necessarily it must be adequate to all the exigencies of litigation. To be agents with such authority is one of the reasons for the existence of the Bar." The principle is similarly expressed in *Williams* v. *Simmons*, 79 Ga. 649 (7 S.E. 133), and *Pike* v. *Andrews*, 210 Ga. 553, 555 (81 S.E.2d 817). In the early case of *Wade* v. *Powell*, 31 Ga. 1,

22, it is sagely said: "It is within the scope of a Solicitor's or Attorney's power and duties to refer the matters in dispute or involved in litigation, which have been confided to their skill and management by their client, to referees or arbitrators, under the sanction and approval of the Court, for adjustment or arbitration, without the consent of his client. . . . And why should not this be so? An Attorney may confess a judgment against his client, and this involves everything." The right of the lawyer to confess judgment on behalf of the client and without his consent continues until the present time, *Petty* v. *Complete Auto Transit*, 215 Ga. 66 (108 S.E.2d 697), even when the confession of judgment effects a compromise of the case. *Elliot* v. *Elliott*, 184 Ga. 417(2) (191 S.E. 465).

In short, the authority spoken of in *Wade* v. *Powell*, 31 Ga. 1, *supra*, as including everything, has expanded rather than contracted during the 103 years since the *Wade* case was written. . . . *Id.* at 552-53, 134 S.E.2d at 602-03.

Indeed, it is clear that the authority of attorneys has been expanded since *Wade* v. *Powell* to the point that an attorney can, without his client's knowledge or authorization, enter into a settlement or compromise which terminates all of his client's interests and rights unless the settlement was in violation of express directions given by the client to the attorney and known to the adverse party or his attorney. See, *e.g.*, *Pike* v. *Andrews*, 210 Ga. 553, 81 S.E.2d 817 (1954); *Elliott* v. *Elliott*, 184 Ga. 417, 191 S.E. 465 (1937). In *Elliott*, which involved a suit for a divorce and cancellation of certain instruments whereby the husband transferred property to his wife. The wife's counsel, without her authorization or knowledge, entered into a consent verdict on the divorce and a decree for

cancellation of the conveyances as prayed. The subsequent action by the wife to have the decree set aside was dismissed. On appeal the court held that the wife's allegations that her lawyer was unauthorized to enter into the agreement did not charge fraud as against the husband or his counsel or show ground for setting aside the consent verdict and decree.

The case of *Pike* v. *Andrews, supra,* involved an action on a series of promissory notes. The defendant's counsel filed a general demurrer to the petition, and when the matter came for a hearing on the demurrer, counsel for the defendant and one of the attorneys representing the plaintiff presented to the court a consent order sustaining the general demurrer and dismissing the plaintiff's case. The consent order was signed without the knowledge or consent of the plaintiff or either of her other two counsel. Subsequently, the plaintiff filed a petition praying that the order be set aside, on the grounds, *inter alia,* of lack of authority on the part of the attorney to enter into the consent order. The court held that the ruling in the *Elliott* case was controlling in the case before it and distinguished the action from other petitions to set aside consent decrees wherein it appeared that counsel for the defendant knew that the plaintiff's counsel had been instructed not to agree to the decree that was entered. *See, Davis* v. *First National Bank of Blakely,* 139 Ga. 702, 78 S.E. 190 (1913); *Evans* v. *Brooke,* 182 Ga. 197, 184 S.E. 800 (1936). The court in *Pike* reasoned that "[t]he decree in each of those cases was set aside because the defendant's counsel knew that the plaintiff's counsel was consenting thereto in violation of express direction of a client. In the case at bar, it does not appear that the plaintiff had ever given any instructions to her attorney in regard to action on the demurrer, or that, if she had given any instructions, they were known

to the defendant or her counsel." 210 Ga. at 557, 81 S.E.2d at 820.

The same result was reached by the court in *Petty* v. *Complete Auto Transit, Inc.*, 215 Ga. 66, 108 S.E.2d 697 (1959), which involved three actions for personal injuries which were settled by a compromise agreement entered into between counsel for the parties. Pursuant to the agreement consent verdicts were prepared and submitted to the jury, and judgment was entered thereon. Later, based in part upon the allegation that their attorney had no authority to settle the cases, the plaintiffs moved for a new trial which was denied. On appeal, the court held: "A judgment rendered with consent of counsel is binding on the client unless such consent was in violation of express directions given by the client to the attorney and *known to the adverse party or his attorney*, or unless there was otherwise fraud or collusion on the part of counsel so consenting, *participated in by the adverse party or his attorney*. . . ." *Id.* at 67, 108 S.E.2d at 699.

This broad interpretation of the authority of an attorney under general retainer has been reaffirmed by the Court of Appeals of Georgia on numerous occasions. In the case of *McCoy* v. *McSorley*, 119 Ga. App. 603, 604, 168 S.E.2d 202, 203, 204 (1969), the court held:

> "The scope of an attorney's authority to act for his client is determined by the contract of his employment. In absence of express restrictions on the attorney's authority in the contract of employment, the authority is plenary. . . . Acts of an attorney on behalf of a party cannot be questioned unless *wholly unauthorized* and then only if the aggrieved party is not guilty of unreasonable delay in acting to correct

the improper acts after notice or knowledge of them. . . ."

In *Hatcher* v. *Georgia Farm Bureau Mutual Insurance Co.*, 112 Ga. App. 711, 146 S.E.2d 535 (1965), a consent order signed by counsel for the parties continuing in effect a temporary restraining order was alleged to be invalid because the attorney entered into the consent order without his client's knowledge and authority. The court after quoting Ga. Code Ann. §9-605, and apparently relying upon it as the source of an attorney's authority to bind his client, held that "[n]o fraud is charged against her counsel by Mrs. Hatcher, and no facts were pleaded by which any fraud could be shown. It is well settled that an attorney may consent and bind his client in a situation of this kind. . . ." *Id.* at 715, 146 S.E.2d at 538 (citations omitted).

As demonstrated by the decisions *supra*, the Court of Appeals and Supreme Court of Georgia have upheld the validity of agreements entered into between counsel without their client's knowledge and authorization, which have gone so far as to authorize consent judgments against their clients and terminate their client's rights in the litigation, *e.g.*, *Pike* v. *Andrews*, *supra* (in which the authority of an attorney to terminate his client's rights under a series of promissory notes was upheld). Consequently, the holding of the Court of Appeals in the case *sub judice* that counsel for J. Edgar Dyal did not have the authority to compromise the pending action upon the express direction of Mr. Dyal, the effect of which was the acceleration of the date for exercise of the option, a premium price of approximately 33% to be received for the land, and a substantial sum of money for the stumps on the leasehold property, is clearly contrary to Georgia law.

B. The Stipulation Agreement Was Clearly an Agreement in Relation to the Cause Which Disposed of the Issues in the Pending Action.

A Georgia statute provides that "[a]ttorneys have authority to bind their clients in any action or proceeding, by any agreement in relation to the cause, made in writing. . . ." Ga. Code Ann. §9-605. The Court of Appeals held, however, that the stipulation agreement in question "was not an agreement 'in relation to the cause.' Nor was it a settlement that disposed of the issues in the proceeding." (App. A at A12). In support of its interpretation of this Georgia statute, the court relied solely upon two decisions of the Fifth Circuit, neither of which involved Georgia law and neither of which supported the court's conclusion. *See Ingalls Iron Works Co.* v. *Ingalls,* 177 F.Supp. 151 (N.D.Ala. 1959), *aff'd,* 280 F.2d 423 (5th Cir. 1960); *Cia Anon Venezolana De Navegacion* v. *Harris,* 374 F.2d 33 (5th Cir. 1967).

The question of whether the stipulation agreement between the parties was an agreement in relation to the cause must be decided according to Georgia law. *Erie R.R.* v. *Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). The court itself recognized the need to look to Georgia law in interpreting the stipulation: "The District Court sitting in Georgia was obliged to follow the Georgia choice of laws rules in determining the validity and effect of the stipulation. *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 1941, 313 U.S. 487, 61 S.Ct. 1020. See *Budget Rent-A-Car* v. *Fein,* 5 Cir. 1965, 342 F.2d 509." (App. A at A12). Obviously, then, the proper inquiry on this issue should have been to the applicable Georgia law, and the court below erred by its failure to do so.

The failure of the Court of Appeals to address itself to applicable Georgia law was patent error and resulted

in an erroneous conclusion as to the nature of the stipulation agreement between the Dyal family and Union Camp. Although Georgia Code Annotated §9-605 has been often cited by courts in Georgia, no court has defined "agreement in relation to the cause." *See Davenport* v. *Davenport*, 218 Ga. 475, 128 S.E.2d 772 (1962); *Ganns* v. *Worrell*, 216 Ga. 512, 117 S.E.2d 533 (1960); *Manis* v. *Genest*, 210 Ga. 16, 77 S.E.2d 525 (1953); *Howell* v. *Howell*, 188 Ga. 803, 4 S.E.2d 835 (1939); *Reece* v. *McCormack*, 188 Ga. 665, 4 S.E.2d 575 (1939); *Cook* v. *Wier*, 185 Ga. 418, 195 S.E. 740 (1938); *Corbin* v. *Goepper*, 184 Ga. 559, 192 S.E. 24 (1937); *Evans* v. *Brooke*, 182 Ga. 197, 184 S.E. 800 (1936); *Lovelace* v. *Lovelace*, 179 Ga. 822, 177 S.E. 685 (1934); *Hatcher* v. *Georgia Farm Bureau Mutual Insurance Co.*, 112 Ga. App. 711, 146 S.E.2d 535 (1965); *Galfas* v. *Ailor*, 81 Ga. App. 13, 57 S.E.2d 834 (1950); *Fluellen* v. *Campbell Coal Co.*, 54 Ga. App. 355, 188 S.E. 54 (1936). A definition of the term has been limned, however, by the Georgia courts. The authorities discussed in Subsection A, *supra*, which involved compromises of pending suits did not base their holdings on Ga. Code Ann. §9-605, but it is clear that the agreements were within the ambit of the section.

In this context, Georgia courts have defined a compromise as "any agreement or arrangement by which, in consideration of mutual concessions, a controversy is terminated." *See, e.g. Fulford* v. *Fulford*, 225 Ga. 9, 16, 165 S.E.2d 848, 853 (1969). By this definition, the stipulation agreement between Union Camp Corporation and the Dyal family would undoubtedly be a compromise of the pending action since by its terms the agreement settled the lawsuit. The fact that the agreement did more than simply settle the points of controversy would not make it any less a compromise. *See Fulford* v. *Fulford, supra*, in which a compromise settlement of an action was upheld

even though it provided for the release of interests in various parcels of land not the subject of the pending action. The decision of the Court of Appeals, logically, then, leads one to the absurd result that an agreement which under Georgia law is a compromise of a suit is nonetheless, not an agreement in relation to the cause and, therefore, not within the ambit of Section 9-605. This, consequently, leads to the result that an attorney is without authority to enter into a compromise on behalf of his client.

Therefore, if the decision of the Court of Appeals is allowed to stand, an attorney would be without authority to compromise an action of this nature; a result totally at variance with Georgia law. In making its decision, the court below simply failed to recognize that the Georgia courts have relied primarily upon prior decisions rather than Section 9-605 as a basis for an attorney's authority and have long upheld the authority of attorneys to enter into agreements of this nature. *E.g., Dean* v. *Jackson,* 219 Ga. 552, 134 S.E.2d 601 (1964); *Petty* v. *Complete Auto Transit, Inc.,* 215 Ga. 66, 108 S.E.2d 697 (1959); *Pike* v. *Andrews,* 210 Ga. 553, 81 S.E.2d 817 (1954).

III. Contrary to the Strong Policy of the Law to Encourage the Compromise and Settlement of Lawsuits, the Decision of the Court of Appeals Imposes an Unnecessary Obstacle to the Compromise and Settlement of Actions Involving Real Property in Georgia.

The policy of the courts to encourage the settlement and compromise of lawsuits is reflected in *J. Kahn & Co.* v. *Clark,* 178 F.2d 111 (5th Cir. 1949). Chief Judge Hutchinson, speaking for the Fifth Circuit in that decision stated:

> "Compromises of disputed claims are favored by the courts." *Williams* v. *First National Bank*, 216 U.S. 582, 30 S.Ct. 441, 445, 54 L.Ed. 625; *Gilliam* v. *Alford*, 69 Tex. 267, 6 S.W. 757. Where the parties acting in good faith, settle a controversy, the courts will enforce the compromise without regard to what the result might or would have been, had the parties chosen to litigate rather than settle. *Hennessy* v. *Bacon*, 137 U.S. 78, 11 S.Ct. 17, 34 L.Ed. 605; *Crisp County* v. *S. J. Groves & Sons Co.*, 5 Cir., 73 F.2d 327, 96 A.L.R. 391; *Camoron* v. *Thurmond*, 56 Tex. 22; *Little* v. *Allen*, 56 Tex. 133.
>
> This court, in *Crisp County* v. *S. J. Groves & Sons Co., supra,* held that an agreement of the parties settling a disputed liability is as conclusive of their rights as a judgment would be if it had been litigated instead of compromised. . . . *Id.* at 114.

The courts of Georgia have also strongly encouraged the settlement and compromise of lawsuits. *See Collins* v. *Collins,* 165 Ga. 198, 140 S.E. 50 (1927); 5 ENCYCLOPEDIA OF GEORGIA LAW, *Compromise and Settlement*, §2.

In the decision *sub judice* the parties entered into an agreement which all intended and believed would terminate the litigation pending between them. Yet, the decision of the Court of Appeals, in contravention of the policy of the law favoring settlement of lawsuits, would declare the settlement invalid as to all titleholders except J. Edgar Dyal. The decision casts doubt on settlement agreements entered into between counsel on behalf of their clients which provide for the conveyance of real property, a situation which Petitioner respectfully submits, warrants the utmost consideration by this Court.

IV. The Court of Appeals' Failure to Accept the Findings of the District Court in Patent Disregard of Rule 52, Federal Rules of Civil Procedure, Is So Grave a Departure from Accepted Judicial Proceedings As to Call for an Exercise of This Court's Power of Supervision.

Rule 52, Fed. R. Civ. P., provides in part that the District Court's "findings of fact shall not be set aside unless clearly erroneous." A plethora of decisions have reaffirmed the viability of this rule. *See, e.g. United States v. National Association of Real Estate Boards*, 339 U.S. 485, 70 S.Ct. 711, 94 L.Ed. 1007 (1950); *Preston* v. *Curtiss National Bank*, 410 F.2d 367 (5th Cir. 1969); *United States Fidelity & Guaranty Co.* v. *Ryder Truck Rental, Inc.*, 405 F.2d 621 (5th Cir. 1969).

The District Court in the case *sub judice* made *inter alia* the following findings of fact:

> 4. The attorneys for the plaintiff and defendants joined in a stipulation of compromise and settlement but subsequently defendants filed a motion on the merits.
>
> 5. Defendants' attorneys who signed the agreement on behalf of their clients acted with unqualified authority to represent their interest in the suit.
>
> 6. James Edgar Dyal, Sr. had apparent authority and actual authority to bind the defendants individually and as trustees to the stipulation agreement and plaintiff reasonably and in good faith acted and relied upon that authority.
>
> 7. The stipulation is a compromise settlement of the action and is clear and unambiguous. (App. C at A38)

The Court of Appeals, however, without holding these findings to be clearly erroneous and in disregard of these findings of fact, concluded that "[t]he stipulation in this case was not an agreement 'in relation to the cause.' Nor was it a proceeding that disposed of the issues in the proceeding." (App. A at A12). The Court of Appeals again ignored both the finding of fact of the District Court as to the authority of J. Edgar Dyal and the mandate of Rule 52, Fed. R. Civ. P., in its holding that "Dyal's acts suffer from the same defects as his counsels': he acted beyond his authority, and he agreed to convey lands without written authority from his principals. Indeed it does not appear that he had even oral authority to do so." (App. A at A16). Petitioner respectfully contends that the failure of the Court of Appeals to follow findings of fact of the District Court which were fully supported by the record in obvious disregard of the mandate of Rule 52, Fed. R. Civ. P., is an error which this Court should review under its power of supervision.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that a writ of certiorari be granted to review the questions present herein.

Dated, Savannah, Georgia, June 7, 1972.

Respectfully submitted,

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Of Counsel.

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1776

UNION CAMP CORPORATION,
Plaintiff-Appellee,

versus

JAMES E. DYAL, JR., ET AL,
Defendants-Appellants,

and

JOHN M. MURRELL, ET AL,
Additional Defendants,
LEON A. WILSON, II, ET AL,
Third Party Claimants.

Appeal from the United States District Court for the Southern District of Georgia

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(March 24, 1972)

Before MORGAN and CLARK, Circuit Judges and RUBIN*, District Judge.

RUBIN, District Judge: An old saw recites that a bad settlement is better than a good law suit. At age 76, J. Edgar Dyal questions this folk wisdom, and seeks to avoid a stipulation that he expressly authorized his lawyers to sign on his behalf and on behalf of the other

*Hon. Alvin B. Rubin, U. S. District Judge, sitting by designation.

defendants, his wife and children and certain other persons who are contingent remaindermen of inter vivos trusts created by him. His wife and children disavow the agreement, Dyal's power to consent to it, and their lawyers' authority to sign it. Four contingent remaindermen of an inter vivos trust created by Dyal, who were named defendants in the suit and had not employed counsel, also object. Union Camp, the plaintiff in this litigation, seeks to enforce the agreement because it is quite clear that a good settlement is better than any law suit.

Determination of the issues concerning the enforceability of the settlement depends on facts not quickly told. Prior to 1941, Dyal had operated a naval stores business and, in connection with it, had acquired extensive lands in Georgia. Among his holdings were contiguous lands comprising 39,283.44 acres, known as Dyal No. 1 (Surrency) Tract, located in Wayne and Appling Counties. On December 15, 1941, Dyal put 10,400 acres of these lands in trust, with Citizens and Southern National Bank, as trustee, for the benefit of his former wife, Ruth, and his five children, Elizabeth Dyal Sammons, Charles Smith Dyal, James E. Dyal, Jr., Milton G. Dyal, and Dorothy Dyal Briscoe. Later that month, he and the trustee signed two agreements with Union Camp, similar in terms, one applicable to 28,883.44 acres and the other applicable to the 10,400 acres held in trust. Each agreement contained a lease for 99 years and an option to purchase the lands after Dyal's death. The purchase price was $15 per acre, and the rental was determined by taking 5% of this amount, 75¢ per acre.

The lessee was authorized, after an initial 7 year growth period to cut specified amounts of timber for commercial purposes yearly. The leases were complex, and it is unnecessary to recite their terms in detail. Each lease provided for termination upon certain specified

defaults, including failure to pay rent, provided the owners ended both of them concurrently.

Thereafter, Dyal treated the property retained by him as two parcels, one of 16,000 acres, and the other of 12,883.44 acres. By various donative transfers, he conveyed interests to his children, and to his second wife, Irene Vaughn Dyal. Milton died, Dyal's other children deeded back the fee ownership of some of the property to him, and other changes in title occurred, so that immediately before this suit was filed, interests in the parcels were owned as follows:

Parcel	Fee	Rental
16,000 acres	J. Edgar Dyal	Irene Vaughn Dyal
12,883.44 acres	45/60 by the four surviving Dyal children and Milton's widow, in equal shares	45/60 same as fee shown in opposite column
	5/60 J. Edgar Dyal	
	10/60 Irene Vaughn Dyal, subject to contingent remainders. Contingent remainders. Contingent remainders, as to 5/60, if Dyal's wife predeceased him; Dyal's nephews, Ernest Eugene Dyal and Forrest Lee Dyal III, and nieces, Mrs. Barbara Dyal Robinson and Mrs. Kay Dyal Miller. Contingent remainders, as to 5/60, if Dyal's wife predeceased	15/60 to Irene Vaughn Dyal

	him, the same contingent remaindermen plus Mrs. Hilja Stranden Lahde, Dyal's housekeeper
10,400 acres	Charles Smith Dyal and James E. Dyal, Jr., successor-trustees for the benefit of themselves and their two sisters.

Dyal and two of his sons, Milton and Charles, continued a naval stores operation under yearly contracts with Union Camp until 1967, terminating the business only after Milton's death in October 1966. James E. Dyal, Jr., operated a pulpwood business on the Surrency tract, and contracted with Union Camp to remove and haul the yearly cut of ½ cord per acre from the lands.

There were many other occasions for negotiations between the Dyals and Union Camp through the years. Problems arose from time to time. When they did, Union Camp discussed them with J. Edgar Dyal, and, after they reached an agreement, Union Camp prepared supplementary documents. Every one of these was executed, without exception, by the various lessors, each on his own behalf, and by Union Camp.

Dyal and his first wife were divorced and, he subsequently married Irene Vaughn Dyal in 1935. Thereafter, Dyal's relationship with his children was not always tranquil. Some of his children have never spoken to their stepmother in these 37 years. There were other family differences, and in fact, one lawsuit between them was pending when this suit was filed.

The lands continued to increase in value over the years; indeed Dyal contends they now have a market value

of $250 an acre, or a total worth of $10,000,000. Meanwhile, Dyal discovered another cause for difference with Union Camp.

The leases had two provisions regarding fuel wood. With respect to fuel wood removed after the seventh year, and during Dyal's life time, Union Camp was required to pay Dyal ½ the market price of the wood. When the trees were first cut, their stumps remained in the ground. Unlike the stumps of later growth, they became increasingly valuable because of a higher resin content. By the time this suit began, Union Camp valued the stumps at $300,000, and Dyal valued them at $600,000 but Union Camp had let them remain in the ground, contrary to its practice of removing and selling them on all its other properties where Dyal had no share of the proceeds. Supported by the definitions in the lease, Dyal contended that the stumps were fuel wood and that Union Camp had deliberately refrained from selling them in order to avoid paying him a share.

After Dyal had repeatedly asked that the stumps be sold and the proceeds divided with him, in 1969 Union Camp offered Dyal a letter contract with respect to them. But Dyal considered the proposal inadequate, and counsel consulted by him expressed the opinion that Union Camp's failure to harvest the stumps might be a violation of the lessee's obligations, hence cause to terminate the lease. Dyal's lawyer notified Union Camp that he was exercising his option to consider the lease terminated, that he would no longer accept rental payments, and that he would re-enter and take possession of the lands.

Dyal then sued Union Camp in a Florida state court for termination of the lease and an accounting. Union Camp removed this suit to the U.S. District Court for the Southern District of Florida. Two months later it filed

this suit, in Georgia, obtained a temporary restraining order enjoining the defendants both from prosecuting the Florida suit and from molesting or interfering with plaintiff's possession and operations in the lands, except that James E. Dyal, Jr. was permitted to continue performing his pulpwood contract. The suit also prayed for a declaratory judgment that would determine Union Camp's obligations with respect to the stumps; a decree that, if its previous practice with respect to them should constitute a default, Union Camp would have the right to remedy it by paying money damages; and a declaration that Dyal did not have the right to put Union Camp in default. Union Camp additionally sought a declaration that it had the right to possession of the lands and trees, and that its option to purchase was valid. Union Camp did not seek to exercise its option, or to enforce it; only a decree that confirmed its validity.

With their forces thus formed to fight, both sides thought it might be advisable to meet at the conference table. A meeting was arranged on the assurance of the Dyals' counsel that the Dyals would be represented by someone who had authority to speak for the entire Dyal family.

On November 3, 1969, Union Camp's Senior Vice President and Union Camp's lawyers met Dyal, and the Dyals' counsel, and Milton's widow's attorney in Miami, Florida. There was some discussion about another property leased by the Dyal family to Union Camp at Fargo, but Dyal said he was not prepared to discuss the problems arising from that lease. However he represented that he was prepared "to talk as to Surrency, and the whole title at Surrency." He said he owned only 16,000 acres, but he nevertheless was prepared to speak "for the whole crowd."

After some hours of negotiations, the two lawyers representing the Dyals, the lawyer representing Mrs. Milton Dyal, and the representatives of Union Camp reached an agreement. They prepared a document bearing the caption of this suit, and entitled "Stipulation." It recited "that all issues between the parties be settled" by Union's purchase of the full fee simple title to all the lands described in the leases for a total purchase price of $547,965.61 (the option price, at $15 per acre), $150,000 for Dyal's interest in stumps, and a premium for acceleration of the purchase option, $202,034.39. The stipulation required delivery of deeds and provided for termination of the leases.

Dyal read the stipulation at least three times. At his suggestion it was altered to recite that the full value of the stumps was $300,000 and that the sum to be paid in reference to the stumps represented ½ of this amount. Before counsel for the Dyals signed, they asked Dyal specifically in the presence of Union Camp's representatives whether he wanted them to sign. His first answer was, "If that's the best you can do, sign it." One of his lawyers replied: "That's not good enough. You tell (us) to sign it or not to sign it." And Dyal said, "Go ahead and sign it."

After the stipulation was signed, there was a general handshaking. Dyal expressed satisfaction that his dispute with Union was settled. Counsel then began to discuss who would prepare deeds, and who would assume responsibility for getting them signed. One of Dyal's lawyers asked, "Which one of your sons would be the better one to handle getting all these deeds signed?" There was evidence that Dyal said, "I don't know if any of them are going to sign it," but it is not entirely clear whether he was referring to his children or the contingent remaindermen. There was also evidence that Dyal's lawyer said to Union Camp's, "George, if any of them don't sign, you

haven't got a deal," but the trial court found that this remark was an "off-the-cuff unconsidered speculation on the legal question relating to the mechanics of putting the agreement into effect," and noted the lack of evidence about whether any of Union Camp's representatives heard the remark. While additional evidence by the attorney for Mrs. Willie Eason Dyal that he heard the statement is now tendered, this would not seem to establish its communication to Union Camp's representatives, and it did not qualify Mrs. Willie Dyal's lawyer's own conclusion that there was a firm mutual understanding and meeting of the minds.

Later that day, after the conference was over, and the conferees had departed, Dyal became dissatisfied with the stipulation and notified his attorney that he did not intend to carry it out. Thereafter, Union Camp was notified of his position.

On the date set for performance of the agreement, Union tendered performance. This was accepted only by Mrs. Willie Eason Dyal, Milton's widow, who accepted her proportionate share of the proceeds of the stipulation, as agreed on by Union Camp's counsel and hers, and executed the necessary deeds to convey her interest both in the Surrency and in the Fargo tracts.

Union Camp then filed a motion to have the stipulation made the judgment of the court. New counsel entered the case for the Dyals, and filed amended pleadings challenging, *inter alia*, the sufficiency of service of process and the court's jurisdiction over the persons of Dyal and his wife, Irene Vaughn Dyal. After a lengthy evidentiary hearing, the district judge ordered summary enforcement of the agreement.

PERSONAL JURISDICTION

The court had jurisdiction of the subject matter of the litigation under the diversity statute because Union Camp is a citizen of Virginia, had its principal place of business in New York and all of the defendants are residents either of Florida or Georgia. 28 U.S.C. §1332. Most of the defendants were residents of Georgia, hence subject to the territorial jurisdiction of the court. The only defendants who did not reside in Georgia were J. Edgar Dyal, his wife Irene Vaughn Dyal, and one of the contingent remaindermen, Mrs. Hilja Lahde. All of them appeared on November 14, 1969, and filed a motion to dismiss. Mrs. Lahde apparently did not expressly retain the counsel secured by J. Edgar Dyal to act on her behalf, but she has never disavowed this action. J. Edgar Dyal concedes that he authorized the execution and filing of the stipulation, although he seeks to avoid its enforcement. These appearances constituted a waiver of the right to object to the court's jurisdiction in personam,[1] and appear to render moot the argument, much labored by counsel, concerning the validity of the service of process on the non-resident defendants obtained in reliance on the Claims In Rem statute, 28 U.S.C. §1655.

But the service was indeed valid even without the appearances. The suit was brought to enforce a "claim to . . . real . . . property" for Union Camp's claim to the Surrency tract was embracive even though it did not

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1. Rule 12(h) states that defenses of lack of jurisdiction over the person and insufficiency of service of process are waived if omitted from a motion under Rule 12(g). That section states that all motions must be consolidated or they are waived, except for those defenses noted in Rule 12(h)(2) and (3). Moore's Federal Practice 4.02[3] §1212, 1222, 1223. See Carter v. Powell, 5th Cir. 1939, 104 F2d 428; Crest Auto Supplies, Inc. v. Ero Mfg. Co., 7th Cir. 1966, 360 F2d 896; Stavang v. American Potash & Chemical Corp., 5th Cir. 1965, 344 F2d 117. Cf. Spearman v. Sterling S.S. Co., E.D. Pa. 1959, 171 F. Supp. 287.

constitute a claim to fee simple ownership. The company had the right to cut timber, to possess the land for 71 more years under its 99 year lease, the option to purchase the fee, the right and perhaps the duty (as Dyal contended) to remove even tree stumps. Such a claim, under Georgia law, constitutes "an interest in the property." *Ward v. McGuire,* 1957, 213 Ga. 563, 100 S.E. 2d 276. "A lease for a period of five years or more is an estate for years under the provisions of Code §85-801," Ward at 278. "If it is in lands, it passes as realty." Georgia Code §85-801. Compare *Hamilton v. Young,* 5 Cir. 1922, 285 Fed. 223, holding that service under Judicial Code §57, the forerunner of Section 1655, was proper in a suit to enforce rights under a leasehold.

It belabors the obvious then to say that Union Camp's right to possess the land was truly in dispute. Dyal had given notice that he would take possession of the lands, and had sued to terminate the leases. If his claims were maintained, Union Camp's right to possess, its right to cut timber, and its option would all end. That it sought at the same time to enjoin proceedings in another forum, a purely in personam claim, would not affect the validity of the service but only the relief that could be granted. This situation is covered in Section 1655 for the statute provides that, if the absent defendant does not appear or plead, "any adjudication shall, as regards the absent defendant without appearance, affect only the property which is the subject of the action."

The pendency of the Florida litigation did not prevent the Georgia court from acquiring jurisdiction. At most, the existence of the prior litigation might have served as a ground to dismiss that part of the motion due to lis pendens. See Moore's Federal Practice 3.06 [2], at 737-739;

Hammett v. Warner Bros. Pictures, 2nd Cir. 1949, 176 F.2d 145, at 150. Hence, there is jurisdiction as to all the parties.

II. DID DYAL OR THE DYAL ATTORNEYS HAVE AUTHORITY TO ENTER THE STIPULATION ON BEHALF OF THE OTHER DEFENDANTS?

The stipulation did not purport merely to settle the law suit. It neither confirmed the validity of the leases and the option, nor declared their invalidity. It was silent as to all other issues raised in this litigation except Dyal's request to share in the stumpage based on a compromise as to value. In no other way did it compose the issues by determining some of them in favor of one party and others in the favor of another. It did not provide for a cash payment to dispose of some of the contentions made. Instead, as it recites, it settled *all issues* between the parties, not merely those in litigation.

When the conference was arranged, counsel for Union Camp promised that one of its officers who could speak authoritatively for the company would attend, but it agreed to participate only on condition that the persons representing the Dyal interests "were prepared to speak for the whole title and deliver titles to the whole property of Surrency No. 1." That was the purpose and the result of the conference.

The stipulation provided for the transfer of title to real property situated in Georgia. Hence Georgia law must be applied in determining its validity as well as the power of agents to execute it. *Brown v. C.I.R.*, 180 F.2d 946, 5th Cir. 1940; *Florida Blue Ridge Corp. v. Tenn. Electric Power Co.*, 5th Cir., 106 F.2d 913; Restatement of Conflicts 2d §§222-226. This rule of *lex loci rei sitae* is also the Georgia statutory rule: "When writings or contracts are intended to have effect in this State, they must be executed

in conformity to the laws of this State. . . ." Ga. Code 102-108. *Sims v. Jones,* 1924, 158 Ga. 384, 123 S.E. 614. See also *Clark v. Baker,* 1938, 186 Ga. 65, 76, 196 S.E. 750. And compare *Kollock v. Webb,* 1901, 113 Ga. 762, 39 S.E. 339, 342; *Goodman v. Nadler,* 1966, 113 Ga. App. 493, 148 S.E. 2d 480; and *Pratt v. Sloan,* 1930, 41 Ga. App. 150, 152 S.E. 275, where a Georgia court enforced the law of the situs of real property when it was in another state.

The district court sitting in G[illegible] was obliged to follow the Georgia choice of laws rules in determining the validity and effect of the stipulation. *Klaxon Co. v. Stentor Electric Mfg. Co.,* 1941, 313 U.S. 487, 61 S.Ct. 1020. See *Budget-Rent-A-Car v. Fein,* 5 Cir. 1965, 342 F.2d 509.

A Georgia statute gives attorneys "authority to bind their clients in any action or proceedings, by any agreement in relation to the cause, made in writing, . . ." Ga. Code 9-605. But the stipulation in this case was not an agreement "in relation to the cause." Nor was it a settlement that disposed of the issues in the proceeding. Cf. *Ingalls v. Ingalls,* N.D. Ala. 1959, 177 F. Supp. 151, Cir. 1960, 280 F.2d 423; *Cia Anon Venezolana De Navegacion v. Harris,* 5 Cir. 1967, 374 F.2d 33. It was a contract to sell lands.

A contract for the "sale of lands, or any interest in, or concerning them," Ga. Code 20-401 §(4)4, "must be in writing, signed by the party to be charged therewith, or some person by him lawfully authorized. . . ." Id. at 201-401. To implement this statute of frauds, Ga. Code 4-105 provides, "the Act creating the agency shall be executed with the same formality . . . as the law prescribes for the execution of the act for which the agency shall be created." This evidently requires that the agent's power to sell land must be in writing absent later ratification of his acts, *Baxley Hardware Co. v. Morris,* 1927, 165 Ga. 309, 140 S.E. 869,

or estoppel of his principal to deny his authority. See *Wade v. Powell,* 1860, 31 Ga. 1; *Fulford v. Fulford,* 1969, 225 Ga. 9, 165 S.E. 2d 848. Compare the statements in the following cases that allegedly unauthorized acts of an attorney in making a settlement of litigation in some manner other than by the conveyance of land may not be questioned if there is "unreasonable delay" in acting to correct the improper acts. *McCoy v. McSorley,* 1969, 119 Ga. App. 603, 168 S.E. 2d 202; See *Jackson v. Jackson,* 1945, 199 Ga. 716, 35 S.E. 2d 258; *City of Atlanta v. Frank,* 1969, 120 Ga. App. 273, 170 S.E. 2d 265. Here there can be no question of ratification or delay on the part of any of the Dyals after the stipulation was signed.

Earlier Georgia jurisprudence tended to support the conclusion that an agent's authority to convey real property need not be in writing. *Brandon v. Pritchett,* 1906, 126 Ga. 286, 55 S.E. 241; (in which however there was also a later oral ratification by the principal) *Collier v. Moore,* Ga. App. 1923, 120 S.E. 441.

However in *Baxley Hardware Co. v. Morris,* 1927, 165 Ga. 359, 140 S.E. 869, the court made clear that the authority of an agent to lease the land of another must ordinarily be in writing, but the jury might find oral authority sufficient if the principal was estopped by her later conduct from raising the issue. One day later the Georgia Supreme Court wrote its opinion in *Byrd v. Piha,* 1927, 165 Ga. 397, 141 S.E. 48, stating, "Where the law prescribes that the act can be executed by the principal only by writing, then the act creating the agency must be executed with the same formality; that is, the agency must be created by writing." Id. at 50. The earlier opinion in *Brandon* was discussed and the court stated that it

would no longer follow that decision.[2] A number of later cases apply the rule that written authority to the agent must be shown to support his sale or lease of the principal's lands. *Dover v. Burns,* 1938, 186 Ga. 19, 196 S.E. 785; *La Rowe v. McGee,* 1931, 171 Ga. 771, 156 S.E. 591, 593; *Hubert Realty Co. v. Bland,* Ga. App. 1949, 53 S.E. 2d 691; *Meeks v. Adams,* La. Co., S.D. Ga. 1949, 49 F. Supp. 489, 494; See also *Butler v. Godley,* Ga. App. 1935, 181 S.E. 494.

In *Nalley v. Whitaker,* 1970, 102 Ga. App. 230, 115 S.E. 2d 790, dealing with a lease of realty, the court stated that one entering into a 15 year lease with an agent "is charged with notice that the agent's authority to execute the lease is required by the law to be in writing and is under a duty to inquire and ascertain whether such written authority exists and what the limits of the authority are, and such person is guilty of negligence in failing to make such an inquiry." Id. at 791.

It is in the light of these decisions that we must interpret *Fulford v. Fulford,* 1969, 225 Ga. 9, 165 S.E. 2d 848. It was there alleged that the parties had made a compromise agreement of a suit to set aside a conveyance of real estate by entering into an agreement whereby the land would be reconveyed and then sold; that the agreement had been made when "all the parties with their counsel met in the courtroom of the Wheeler County courthouse. . . ." The defendant demurred to this count on the ground that the alleged compromise was not in writing. The court held that the agreement was not void, because it was "an agreement for the compromise of a pending cause . . . made by a party and his counsel on the one hand, and by the counsel of the opposite party and

2. Note the extensive dissenting opinion in *Brandon* by Justice Atkinson who was still a member of the court at the time of the *Byrd* decision.

ratified by his client. . . ." The court's opinion quoted with approval an earlier observation that the requirement of a written power of attorney be in writing has "no application to an oral agreement and compromise of a pending suit. . . ." In *Fulford,* however, title to the property was at issue in the litigation, and all the parties expressly ratified their attorney's settlement. That, too, was the basis for enforcing the stipulation entered by counsel in a land line dispute, *Dean v. Jackson,* 1964, 219 Ga. 552, 134 S.E. 2d 601, where the court found that the client gave express assent to the action taken by his attorney.

The lawyers representing the Dyals never purported to act on their own authority as lawyers, express or implied. They made it clear in the presence of Union Camp's representatives that they were seeking authorization from J. Edgar Dyal, and would sign only if he instructed them.

The trial court concluded also that Dyal was in fact "the agent of all of the defendants in this case" except Mrs. Willie Eason Dyal, and "possessed authority to act for them in all matters pertaining to the litigation including the settlement thereof." But Dyal's agency was more tenuous than the lawyers'; they at least had a written letter of employment. His authority was purely oral.

While the evidence with respect to Dyal's actual authority is contradictory, we are not left with the firm conviction that the trial court's finding was clearly erroneous. FRCP Rule 52; Moore's Federal Practice §52.03 [1]; see *Western Cottonoil Co. v. Hodges,* 5th Cir. 1954, 218 F.2d 158, *Preston v. Curtiss National Bank,* 5th Cir. 1969, 410 F.2d 367; Cf. *Seaton v. Sills,* 5th Cir. 1968, 403 F.2d 710. But the conclusion reached from this fact does not follow: because J. Edgar Dyal had authority to settle

the law suit does not mean that he had power to agree to convey a fee interest in the real property. "An agent is authorized to do, and to do only," the Restatement of Agency 2d §33 correctly tells us, "what it is reasonable for him to infer that the principal desires him to do in the light of the principal's manifestations and the facts as he knows or should know them at the time he acts." There is no evidence that the Dyal family desired him to sell their interests in the land. Authority to sell the principal's property is inferred only when it is incidental to the transaction, usually accompanies the authority expressly conferred or is reasonably necessary in accomplishing it. Restatement of Agency 2d §52.

The sale of Surrency was not incidental or reasonably necessary to settling the litigation. Indeed the reverse is true: the litigation was incidental to ownership of the fee. Nor does authority to sell a fee in real property usually accompany authority to negotiate for settlement of the type of claim the Dyals were presenting. Authority to act in the principal's business does not usually imply authority to sell the principal's interest in lands. Restatement of Agency 2d §52[b]. Dyal's acts suffer from the same defects as his counsels': he acted beyond his authority, and he agreed to convey lands without written authority from his principals. Indeed it does not appear that he had even oral authority to do so.

III. DID DYAL AND THE LAWYERS HAVE APPARENT AUTHORITY?

The trial court found that Dyal (and the Dyal lawyers) had apparent authority to represent all of the defendants. The source of this authority is found in Dyal's having handled all negotiations with Union Camp for 28 years, from the circumstances surrounding the Miami

conference, and from his declarations there that he possessed authority from all the titleholders. But it is commonly held that, if an agent must have written authority to act, he cannot be orally vested with apparent authority, any more that he can be orally vested with a real one. Restatement of Agency §159 and 185. Absent estoppel or ratification, apparent authority cannot remedy the lack of the written power requisite under the statute of frauds.

Beyond that, while the evidence does support the conclusion that Dyal had apparent authority to negotiate for his family with respect to the leases and their modification, it does not lead to the conclusion that he ever was held out as having any authority to end the leases or to sell the lands subject to them. The defendants had merely permitted J. Edgar Dyal to negotiate on their behalf with respect to various problems incident to the leases from time to time.

Nor is it contended that J. Edgar Dyal was the defendants' universal agent. He had no authority, real or apparent, to sell their homes or their other property. The other principals never themselves represented that he had authority to sell their interests in the Surrency Tract. The sole evidence of his authority to do this was his own assertion. But an agent cannot by his own act endow himself with apparent authority. His principals must in some way hold him out as their agent. Mechem, Outlines of Agency 4th Ed. §94, p. 61.

Indeed it must have been apparent to Union Camp's representatives, had they reflected on it, that J. Edgar Dyal's interests and those of the other persons he purported to represent were in conflict. His wife would have received a rental of $12,158.19 a year at least so

does not void the remainder. The character of the contract in such case is determined by the intention of the parties.

"In some cases even an entire contract is apportionable . . . ." Ga. Code 20-113.

Some evidence of the severability of the agreement is provided by the fact that Mrs. Willie Eason Dyal, Milton's widow, has in fact performed it, and conveyed her interest in the properties to Union Camp.

The trial court correctly found that the parties had implicitly arrived at a formula whereby the share of the price to be paid could be divided among the owners. No difficulty is encountered in doing so, for the agreement provided merely for three things, payment to the fee owners of $15 per acre for the share of each (the original option price), payment to J. Edgar Dyal of $150,000 for his share of the stumpage claim, and payment of $202,034.39 as a premium for acceleration of the option. The latter amount is approximately $5.14 per acre. Hence J. Edgar Dyal is due $231,636 for his share of the fee[4] $87,779.59 for acceleration of the option,[5] and $150,000 for the stumpage. Any claim he may have to benefit if the suit to terminate the lease succeeds will be conveyed to Union Camp.

V. IS THE RESULT UNCONSCIONABLE?

The final argument offered on behalf of J. Edgar Dyal is that the agreement obliges him to sell at $15 an acre property worth more than ten times that amount. But this is only a vision of streets paved with gold, de-

4. 5/60 interest in 12,883.44 acres and full fee ownership of 16,000 acres.

5. Computed on both interests. See Note 4.

pendent upon Dyal succeeding in all his demands. It does not take into account what was really bought and sold—the chances of success or failure.

There is no claim that the option price was not fair when it was fixed. In 1971, Dyal had only a litigious claim to terminate the lease. If it failed, he would receive nothing from the law suit, though his heirs would eventually get the purchase price for the fee. Under the settlement agreement, he received a substantial sum for his stumpage claim and for the purchase price of a part of the fee, plus a bonus, during his lifetime. It is not necessary for us to speculate whether he made a good bargain or a bad one; it clearly was one that conscience can bear.

As to all the defendants, other than J. Edgar Dyal and Mrs. Willie Eason Dyal, the suit may continue. Determination of their rights will abide the outcome of the litigation.

The judgment of the district court is affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1776

UNION CAMP CORPORATION,
Plaintiff-Appellee,

versus

JAMES E. DYAL, JR., ET AL,
Defendants-Appellants,

and

JOHN M. MURRELL, ET AL,
Additional Defendants,

LEON A. WILSON, II, ET AL,
Third Party Claimants.

Appeal from the United States District Court for the Southern District of Georgia

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Mar. 24, 1972, 5 Cir., 1972, ... F.2d .....).

(April 28, 1972)

Before MORGAN and CLARK, Circuit Judges and RUBIN,* District Judge.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the

*Hon. Alvin B. Rubin, U. S. District Judge, sitting by designation.

Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

CIVIL ACTION NO. 966

UNION CAMP CORPORATION,
Plaintiff,

v.

JAMES E. DYAL, JR., and CHARLES SMITH DYAL, each individually and both as surviving Substitute Co-Trustees under a Trust Deed dated December 15, 1941; MRS. WILLIE EASON DYAL, individually and as Administratrix of the Estate of MILTON DYAL, deceased; JAMES E. DYAL; MRS. IRENE VAUGHAN DYAL; MRS. ELIZABETH DYAL SAMMONS; MRS. DOROTHY DYAL BRISCOE; ERNEST GENE DYAL; FORREST LEE DYAL (III); MRS. BARBARA DYAL ROBINSON; MRS. KAY DYAL MILLER; and MRS. HILJA STRANDEN LAHDE,
Defendants,
and
JOHN M. MURRELL, Esq., and JULIAN F. CORISH, Esq.,
Additional Defendants,
and
LEON A. WILSON, II, Esq., and C. EDWIN ROZIER, Esq.,
Third Party Claimants.

BOOTLE, Chief Judge:

For decision now is the question whether to grant or not to grant plaintiff's written motion that an alleged com-

promise settlement agreement dispositive of all the issues between plaintiff and all the defendants in the captioned case be made the order and judgment of the court.

The facts leading up to this litigation and to this motion are found to be as follows. The case arises out of a controversy between citizens of different states, between J. Edgar Dyal (Mr. Dyal) and the members of his family on the one hand and Union Camp Corporation on the other. The case concerns approximately 39,300 acres of land known to the parties as the "Dyal # 1 (Surrency Tract", located in Wayne and Appling Counties, Georgia. This land is held by Union Camp Corporation under 99 year leases with option to purchase as the successor to Union Bag and Paper Company, which leased approximately 29,000 acres of the land from Mr. Dyal and 10,400 acres from the Citizens and Southern National Bank, as Trustee.

Both leases were entered into on December 30, 1941. The tract of 10,400 acres held in trust by the Citizens and Southern National Bank had been placed in trust by Mr. Dyal as donor on December 15, 1941, for the benefit of his former wife, Mrs. Ruth Dyal, and his five children, Elizabeth Dyal Sammons, Charles Smith Dyal, James E. Dyal, Jr., Milton G. Dyal, and Dorothy Dyal Briscoe. The terms and conditions of the two leases were in all material respects identical and from the outset the parties regarded the Dyal # 1 (Surrency) tract as being covered by a single set of terms and conditions.

The leases are long and complex. They are for the term of 99 years with an option to purchase the lands after the death of Mr. Dyal. The purchase price was fixed at $15.00 per acre and the annual rental, to be paid in monthly installments, was set at 5% of the agreed value of the land, $0.75 per acre per year. In addition to the monthly

installments, the lessee was required to maintain the lands and timber by "sound forestry methods" and pay a minimum of 5 cents per acre per year into a maintenance fund with a maximum of 10 cents per acre if federal matching funds could not be obtained. Disputes regarding forestry practices were to be settled by arbitration. The lessee was obligated to pay all taxes levied against the property.

In return for these considerations the lessee was granted complete and exclusive use and control of the lands and timber thereon. After an initial seven year growth period, lessee was authorized to remove annually ½ cord per acre of pulpwood which was fixed as the annual cumulative growth. The lessee was forbidden to remove any other timber except that necessary for proper maintenance of the forest by thinning, fire lanes, etc. "Fuel wood, which the leases defined as "all stumps, butts, tops, limbs, dead trees and trees that are rotten doty, or otherwise undesirable for pulpwood or saw log use," might be removed during the initial seven year period for use in connection with turpentine operations on the land. Thereafter any fuel wood used for commercial purposes would be paid for over and above the stipulated rental at the rate of ½ the market price per cord.

Mr. Dyal was primarily a naval stores producer and the leases contained detailed provisions regarding the manner in which turpentine operations might be conducted on the lands. In addition, the lessee was required to maintain for five years the turpentine equipment which was then located upon the land.

The default conditions of the two leases covering the lands were required to be exercised, if at all, concurrently.

They provided in essence that upon default of the lessee in the monthly rental payments or any other con-

dition required by the leases for three months, after written notice, the lessor at his option might "declare the entire lease terminated and reenter and take possession of the land and premises." They provided in the alternative that if the rental payments were in default for sixty days, the lessor might declare due the payments for the remainder of the lease year—until the next January—and proceed at once to their collection.

During the years which followed the making of the leases, Mr. Dyal made gifts to members of his family of interests in the land on numerous occasions. Each deed recited that the interest conveyed was subject to the lease and option to purchase of Union Bag and Paper Company. These gifts resulted in frequent changes in the holders of the record title, and of the persons entitled to receive the rental payments from the lands. Mr. Dyal reserved to himself all payments due under the leases for fuel wood during his lifetime.

In making gifts of interests in the lands, Mr. Dyal treated the tract as being composed of three parcels: one of 16,000 acres; one of 12,900 acres, and one of 10,400 acres, the last named being the trustee lands. At the time of the filing of this suit, on August 28, 1969, these three tracts were, in general terms, held as follows: the 16,000 acre tract was held by Mr. Dyal, with the rent being paid to Irene Vaughan Dyal, his wife; the trustee lands, 10,400 acres, with Charles Smith Dyal and James E. Dyal, Jr., as surviving substitute co-trustees, were held for the benefit of the two surviving sons and two daughters, and they received the rental payments due under the lease of these trustee lands; the 12,900 acre tract being held as follows: 45/60 by the three sons and two daughters (Milton having died in October, 1966, his widow and executrix held his share), and they received the rent from their un-

divided shares. Mr. Dyal and his wife, Irene Vaughan Dyal, held the remaining 15/60 of this parcel with two nephews, Ernest Gene Dyal and Forrest Lee Dyal III, and two nieces, Mrs. Barbara Dyal Robinson and Mrs. Kay Dyal Miller, as contingent remaindermen of a 5/60 undivided portion and the same four nephews and nieces with the Dyal housekeeper, Mrs. Hilja Stranden Lahde, an additional contingent remainderman, as to another 5/60 portion. The rent from this 15/60 portion was received by Mr. Dyal and his wife.

The experience of the parties under the leases was profitable although not always peaceful. Family difficulties ensued upon the divorce of Mr. Dyal from Mrs. Ruth Dyal and his subsequent marriage to Irene Vaughan Dyal. One or more of the sons and daughters have never spoken to their stepmother. However, Mr. Dyal and two of his sons, Milton and Charles Smith, continued a profitable naval stores operation on the land under yearly contracts with Union Camp Corporation until 1967 and ceased its operation only upon Milton's death which occurred in October, 1966. James E. Dyal, a pulpwood operator, has held for many years contracts with Union Camp Corporation to remove and haul the yearly cut of ½ cord per acre from the lands.

Problems which arose from operations under the leases were settled by supplementary agreements, both formal and informal, between the lessors and the lessees. On a single occasion, following disastrous fires in 1954 and an insect infestation about the same time, Union Camp Corporation, being forced to cut the salvageable timber, found it necessary to bring suit against the lessors to establish that its rights in the ½ cord per year were cumulative. That suit is reported at 263 F. 2d 387, sub nom. *Dyal* v. *Union Bag-Camp Paper Corporation* (5th Cir. 1959).

A difficulty arose in the Dyal family in 1967 regarding certain gifts made by Mr. Dyal which resulted in a suit being brought by Mr. Dyal and the Georgia Baptist Children's Home against his wife, his four surviving children and Union Camp Corporation to validate the deeds of gift. The sons and daughters answered, inter alia, with a cross claim against Union Camp Corporation asking that the option to purchase to which their interests were subject be declared void. The suit was still pending on August 28, 1969, when the present suit was filed.

The difficulty which led to the instant action arose from the delay of Union Camp Corporation in complying with the request of Mr. Dyal to remove resinous stumps from the lands as "fuel wood" and pay him ½ the market price per cord. The stumps in question were from old trees of a former vintage; modern pines do not produce such stumps. The value of the stumps derives not from their use as fuel but from the resin products they produce. Union Camp Corporation was doubtful of its right under the leases to harvest these stumps except for fuel wood. In recent years the stumps have become more and more valuable, particularly where "clear cutting" is done of the timber and the stumps are thus made readily accessible. Estimates of the value of the stumps on the leased lands at the time of this action were placed at $300,000.00 by Union Camp officials. Mr. Dyal thinks they have a higher value.

After repeated overtures of Mr. Dyal in 1969 Union Camp officials determined that the fuel wood provisions of the leases provided the right to harvest the stumps for extraction of resins and offered Mr. Dyal a letter contract dated May 22, 1969. He rejected the contract and turned the matter over to his attorney. The attorney, by letter of May 29, 1969, advised Union Camp Corporation that

Mr. Dyal had decided to exercise the option provided by the contract to "declare the entire lease terminated and reenter and take possession of the land and premises." On June 5, 1969, Mr. Dyal filed suit in the Dade County, Florida Court for cancellation and termination of the lease agreement and for an accounting. In letter dated June 10, 1969, Mr. Dyal notified Union Camp Corporation that he and Mrs. Dyal would no longer accept rental payments. Despite this refusal and a similar one from the sons and daughters Union Camp continued the rentals, depositing them into court. Thereafter, Mr. Dyal, by letter of July 22, 1969, reiterated to Union Camp his election to "terminate and cancel the 1941 lease arrangement."

On August 3, 1969, Mr. Dyal met with his two sons and two daughters and discussed the actions he was taking against Union Camp. He secured quitclaim deeds from them of their interests in the lands involved in the Appling County suit and their agreement to settle that action.

Union Camp Corporation removed the suit brought against it in the Florida Court to the United States District Court for the Southern District of Florida, Miami Division, on June 27, 1969, and, on August 28, 1969, filed the complaint in this action seeking a declaration of its rights and to enforce its claim to the land and timber thereon under 28 U.S.C. §1655. It sought and obtained a temporary restraining order enjoining Mr. Dyal from prosecuting his action in the Federal District Court of Florida, and the cross claimants from prosecuting their cross claims in the Superior Court of Appling County, Georgia until the rights of the parties had been determined by this court. The temporary restraining order also restrained and enjoined all the defendants, except James E. Dyal, Jr., (then conducting pulpwood operation on said

lands under contracts and agreements with Union Camp) from molesting or interfering with plaintiff's possession and operations on the lands.

By stipulation of counsel and court orders the temporary restraining orders were continued and the time for filing defensive pleadings was extended, first to September 22, 1969, then to November 1, 1969, and finally to November 15, 1969.

Union Camp filed a petition to remove the action against it in Appling County to this court on October 6, 1969, and found out later that the two sons and two daughters had, by a pro se action on their part and without knowledge of their attorneys in that case, dismissed the suit on September 24, 1969.

On November 5, 1969, the representatives of the parties and their then counsel of record in this case met in Miami, Florida, in the law offices of one of the attorneys then representing them and appearing of record for all defendants with Mr. Dyal present in person, and saying that he could speak for all owners of the Dyal # 1 (Surrency) tract. "Mr. Dyal had told Mr. Kinney (Senior Vice-President of plaintiff, who had come from New York to attend the conference) and he had told all of us, that he couldn't do anything with Fargo (a tract not involved in this litigation), that it belonged to his children, but that he was prepared to talk as to Surrency, and the whole title at Surrency. He said in that regard that while he only owned 17,000 acres . . . he nevertheless was prepared to speak for the whole crowd." (Record 313). A "stipulation was entered into in words and figures as follows:

"UNION CAMP CORPORATION, :
Plaintiff, :
vs. :
"JAMES E. DYAL, et al., :
Defendants. :
Civil Action No. 966

"STIPULATION

"It is stipulated between the Plaintiff and the Defendants in the above and foregoing case that all issues between the parties be settled by and through the purchase by Plaintiff from the Defendants of the full fee simple title to all the lands covered by and described in the two (2) leases held by Plaintiff, set forth at "Exhibit A" and "Exhibit B" of the original Complaint, at and for a total purchase price of $900,000.00, composed of the following items, viz.: Option purchase price of $547,965.61; ½ interest in stumps of ($300,000.00), $150,000.00, and premium for acceleration of purchase option, $202,034.39.

"Defendants are to execute and deliver to Plaintiff all deeds of conveyance necessary to convey said fee simple title to said lands to Plaintiff against payment of said sums, and at which time the obligations of Plaintiff to Defendants under the terms of said leases shall terminate with the merger of the leasehold estates with the title as so conveyed.

"Consummation of said settlement shall be made at the offices of Bouhan, Williams & Levy, Attorneys

for Plaintiff, at Savannah, Georgia, on or before December 15, 1969, or as soon thereafter as possible.

"At Miami, Florida, November 5, 1969.

"/s/ John M. Murrell
/s/ A. Alaimo
/s/ Julian F. Corish
Counsel for Defendants
/s/ George W. Williams
Counsel for Plaintiff"

This conference lasted for some four and one-half hours, from 10 A.M. until about 2:30 P.M. without any lunch break, (Record 319), and had been preceded by an oral understanding on the part of counsel representing both sides that Union Camp would have present at the conference in addition to counsel an officer fully authorized to speak authoritatively for the company and that the defendants would have present in addition to counsel someone fully authorized to speak authoritatively for all defendants. Counsel for plaintiff had advised Mr. Corish, counsel for defendants, that Union Camp would not go into the conference unless "we were prepared to speak for the whole title and deliver title to the whole property of Surrency No. 1." (Record 309). After the terms of the stipulation were agreed upon orally it was reduced to writing in longhand by counsel for the plaintiff. Later, during the conference, it was typewritten to be more legible. It was read not only by counsel but by Mr. Dyal, who read it at least three times (Record 317), and at Mr. Dyal's suggestion one alteration was made so as to make it reflect that the full value of the stumps was $300,000.00, and that the $150,000.00 which the stipulation required the plaintiff to pay in reference to stumps represented one-half of said amount. It was retyped to accomplish this

change. (Record 316). The stipulation was prepared for signature by counsel only and before counsel for the defendants signed they asked Mr. Dyal specifically whether he wanted them to sign. His first answer was to the effect that if that was the best settlement they could obtain they should sign. Counsel for the defendants then stated in effect that they would not sign the stipulation if there was any equivocation as to their instructions and then Mr. Dyal instructed them positively and without any qualifications or equivocations to sign.[1]. The stipulation was then signed, first by Mr. John M. Murrell, counsel for the defendants; next by Mr. A. Alaimo, the attorney present at the conference representing Mrs. Willie Eason Dyal, the widow of the deceased son Milton Dyal; then by Mr. Julian F. Corish, counsel for the defendants, and then by Mr. George W. Williams, counsel for plaintiff, and copies were exchanged. Then those present shook hands. After the stipulation was signed Mr. Dyal said "that he had Union Camp on the run, but he was glad it was settled, that his wife and family—he was getting old and he was in ill health and that his family had been after him to settle the case." (Record 320). After the stipulation was signed and copies exchanged and conferees were about to leave not surprisingly the attention of Georgia counsel turned to the chore of preparing deeds, the stipulation having called for "all deeds of conveyance necessary to convey said fee simple title" and Mr. Corish commented that if any deeds were going to be drawn Mr. Williams, counsel for plaintiff, was going to prepare them. (Record 318). According to Mr. Corish's testimony he is the only

1. After Mr. Dyal had read the stipulation for the third time his counsel asked: "Shall we sign it?" Mr. Dyal replied "If that's the best you can do, sign it." His counsel replied: "Mr. Dyal (or 'Edgar') that's not good enough. You tell Mr. Murrell and Mr. Alaimo and me to sign it or not to sign it." And Mr. Dyal said: "Go ahead and sign it."

one of the six conferees who remembers that he turned to Mr. Dyal and said: "Which one of your sons would be the better one to handle getting all these deeds signed", and that Mr. Dyal replied: "I don't know. I don't know if any of them are going to sign it," and that Mr. Corish turned from his left to his right where Mr. Williams was and said: "George, if any of them don't sign, you haven't got a deal." Mr. Corish testified that of the six people in the room he's the only one who remembers that. (Record 319).

Mr. Corish, as a Georgia attorney was of the opinion that deeds from the five contingent remaindermen would not be necessary, but noticed, of course, that the stipulation apparently contemplated deeds from them. The five contingent remaindermen, four in deed from Mr. Dyal to Mrs. Dyal, dated March 8, 1965 (Paragraph VIII) Exhibit D-1 attached to complaint and five in deed from Mr. Dyal to Mrs. Dyal dated March 20, 1966 (Paragraph IX) Exhibit D-1 attached to complaint, have a contingent remainder interest under each conveyance in 1 12 of the 12,900 acre tract contingent upon Mrs. Irene Vaughan Dyal's predeceasing or dying at the same time as Mr. Dyal. At the time of the stipulation Mr. Dyal was 75 years of age and not in good health, and Mrs. Dyal was younger and in good health. These conveyances expressly excluded yearly rental payments and recited "the intent of this conveyance is that if my wife, Mrs. Irene Vaughan Dyal, predeceases me (the named remaindermen in each deed) will be paid only the 1 12 undivided interest of $12,663.80 when Union Bag and Paper Corporation exercise their option to buy upon the death of James Edgar Dyal." It was Mr. Corish's position when he first discussed it with Mr. Williams, counsel for plaintiff, that these contingent remaindermen did not have to be named

parties defendant in the litigation, that their interests were fully protected by the presence of Mrs. Dyal as a party defendant, his opinion being based upon the landmark case of *Schley, Executor, et al* v. *Brown*, 70 Ga. 64, (1882) and his failing to concur in any contrary indication, if there be any, in *Cooney* v. *Walton*, 151 Ga. 195 (1921). He realized, of course, that since these contingent remaindermen are named as parties defendant in this case answers should be filed for them. Mr. Dyal told him when he first talked about representing them to go on and file defensive pleadings for all of the defendants. Mr. Dyal told him also that the contingent remaindermen had no interest in the case. (Record 322 and 323). Neither the plaintiff nor its counsel was ever notified that counsel who filed pleadings for all defendants did not represent the contingent remaindermen if they did not represent them. (Record 323). The letter retaining Mr. Murrell and Mr. Corish to represent the defendants in this case reads as follows:

"September 5, 1969

"Mr. John M. Murrell and
Mr. Julian F. Corish
Attorneys for J. Edgar Dyal
1101 Brickell Avenue
Miami, Florida 33131

"Gentlemen:

"We, the undersigned, are named as defendants in a certain Civil Action, numbered 966, filed by Union Camp Corporation as plaintiff, in the District Court of the United States for the Southern District of Georgia, Brunswick Division.

"This will serve to authorize you to file such pleadings and to take such steps as you deem necessary to protect our interests in this litigation.

"Very truly yours,

"/s/ James E. Dyal, Jr.
James E. Dyal, Jr., individually and as surviving Substitute Co-Trustee under a Trust Deed dated December 15, 1941

"/s/ Charles Smith Dyal
Charles Smith Dyal, individually and as surviving Substitute Co-Trustee under a Trust Deed Dated December 15, 1941

"....

Mrs. Willie Eason Dyal, Individually and as Administratrix of the Estate of Milton Dyal, deceased

"/s/ James E. Dyal
James E. Dyal

"/s/ Mrs. Irene Vaughan Dyal
Mrs. Irene Vaughan Dyal

"/s/ Mrs. Elizabeth Dyal Sammons
Mrs. Elizabeth Dyal Sammons

"/s/ Mrs. Dorothy Dyal Briscoe
Mrs. Dorothy Dyal Briscoe"

Later in the day and after the conference was over and the conferees had dispersed, Mr. Dyal became dissatisfied with the stipulation and notified his counsel he did not intend to carry it out, and he, Mr. Dyal, personally so notified plaintiff's representatives two days later.

Notwithstanding the stipulation of settlement defendants filed defensive pleadings on November 16, 1969, in-

cluding a motion to dismiss for failure to state a claim upon which relief could be granted.

On December 15, 1969, the date set for performance of the settlement agreement, Union Camp made a proffer of deeds prepared by its counsel for execution by the defendants and made also a tender of $900,000.00 to the defendants. The proffer and tender were refused by all of the defendants except Willie Eason Dyal, who accepted her proportionate share of the proceeds of the settlement agreement as such proportionate share was agreed upon by plaintiff's counsel and her counsel and she executed the necessary deeds. Incidentally, Mrs. Willie Eason Dyal also conveyed to plaintiff her interest in the Fargo tract not involved in this litigation.

On December 29, 1969, plaintiff filed its motion to have the stipulation agreement made the order and judgment of the court. New counsel then entered the case for the defendants and filed amended pleadings challenging, inter alia, the jurisdiction of the person of Mr. Dyal and Irene Vaughan Dyal. On January 5, 1970, former counsel for the defendants, Mr. Murrell and Mr. Corish, gave notice to the court of their claim of lien for attorneys' fees against Mr. Dyal's share of the proceeds of the settlement agreement and on January 8, 1970, former counsel for the two sons and two daughters in the Appling County suit, Messrs. Leon A. Wilson, II and C. Edwin Rozier, filed a motion to intervene in this case to assert their claim and attorneys' lien against the portion of the proceeds of the settlement agreement belonging to their former clients.

On January 20, 1970, this court ordered in substance:

(a) recognition of the validity of the tender made by Union Camp Corporation;

(b) abatement of all rentals on the lands;

(c) that former counsel, John M. Murrell and Julian F. Corish, be made additional defendants;

(d) that Leon A. Wilson, II and C. Edwin Rozier be made third party claimants with a right to participate in all proceedings until their motion to intervene be heard.

By stipulation of counsel approved by order of the court dated March 24, 1970, the tendered amount of $863,808.45 was deposited at interest to await the order of the court.

The evidentiary hearing on this motion continued for three full days and well into the fourth and the oral testimony thus adduced is supplemented by stipulations, affidavits, and depositions. The court has had the benefit of oral arguments and carefully prepared briefs."

This being a motion to summarily enforce a settlement agreement entered into by parties litigant in a pending case the factual issues presented by the pleadings in the case become irrelevant. The only issues relevant on the hearing of this motion are:

(1) the jurisdiction of this court over the subject matter of the litigation, and

(2) the validity of the compromise settlement agreement itself. *Cia Anon Venezolana De Navegacion* v. *Harris*, 374 F. 2d 33 (5th Cir. 1967).

Having heard and carefully considered all of the evidence, oral, documentary, and stipulations, the court now makes further findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. The plaintiff and defendants are citizens of different states and the principal place of business of plaintiff at the time of the filing of this suit was in the State of New York and the amount in controversy exceeds $10,000.00 exclusive of interest and costs.

2. Plaintiff's claim is to real property located within the territorial jurisdiction of this court and preexisted the initiation of this action.

3. Service of process was made personally upon each of the resident defendants and the non-resident defendants were served personally with an order of the court to appear or plead by a day certain.

4. The attorneys for the plaintiff and defendants joined in a stipulation of compromise and settlement but subsequently defendants filed a motion on the merits.

5. Defendants' attorneys who signed the agreement on behalf of their clients acted with unqualified authority to represent their interest in the suit.

6. James Edgar Dyal, Sr. had apparent authority and actual authority to bind the defendants individually and as trustees to the stipulation agreement and plaintiff reasonably and in good faith acted and relied upon that authority.

7. The stipulation is a compromise settlement of the action and is clear and unambiguous.

CONCLUSIONS OF LAW

1. This court has jurisdiction in the premises pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 1655.

2. The stipulation agreement is binding on all the defendants individually and as trustees.

3. Plaintiff is entitled to an order and judgment granting specific performance of the stipulation agreement by the defaulting defendants."

DISCUSSION

There is a stipulation that Union Camp Corporation is a corporation organized and existing under the laws of the State of Virginia and is a citizen thereof (Record 16) and that each of the defendants, additional defendants, and third party claimants is a citizen of the United States but not a citizen of the State of Virginia, New York, or New Jersey, (Record 17), and the evidence shows that the principal place of business of Union Camp Corporation was at the time of the filing of this suit in the State of New York, New York City. It is a large corporate organization with diverse activities located in 20 states, Puerto Rico, and 3 foreign countries, all under central direction, supervision and control of the executive offices of the company. In October of 1969 the office and principal place of business was transferred out of New York City to Wayne, New Jersey. The jurisdictional facts existing at the time of the commencement of this suit are controlling. *Anderson* v. *Southern Bell Telephone & Telegraph Company*, 209 F. Supp. 921 (M.D. Ga. 1962). In a corporate operation of this type the principal place of business is properly determined by the location of the executive offices, the so-called "nerve center" of the corporation, *Scot Typewriter Co.* v. *Underwood Corp.*, 170 F. Supp. 862 (S.D. N.Y. 1959); *Anderson* v. *Southern Bell Telephone & Telegraph Co.*, *supra*, and the principal place of business of Union Camp Corporation for the purposes of this suit is New York where the executive offices were located on August 28, 1969.

There can be no serious contention that the amount in controversy does not exceed $10,000.00 exclusive of interest and costs. The testimony shows that plaintiff's interest in the resinous stumps on this land would be worth approximately $100,000.00 to $150,000.00, and that as of July 31, 1969, plaintiff claimed in excess of 16,000 cords of accumulated growth which it was entitled to cut and remove at that time having an estimated value of $160,000.00.

Plaintiff's claim to the right of continued possession of these lands, trees and timber and its request for a declaratory judgment as to the validity and continuing validity of the options to purchase arising out of these leases amounts to a "claim to . . . real . . . property within the district . . ." 28 U. S. C. § 1655. *Shuford* v. *Anderson*, 352 F. 2d 755 (10th Cir. 1965); *McQuillen* v. *National Cash Register Co.*, 112 F. 2d 877 (4th Cir. 1940). See also *Hamilton* v. *Young*, 285 Fed. 223 (5th Cir. 1922) holding that the predecessor of 28 U.S.C. § 1655 confers jurisdiction "to enforce appellee's claim to an interest in the leasehold estate." The plaintiff asserts a claim to a proprietary interest in the property, a lease for 99 years plus an option to purchase, which in Georgia is an interest in land and an estate for years. *Ward* v. *McGuire*, 213 Ga. 563, 565 (1957). See also *Schofield* v. *Jones*, 85 Ga. 816, 823 (1889). The case of *Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357, 54 L. Ed. 1069 (1910), relied upon by defendants, is easily distinguishable because the plaintiff there in a law suit brought in Georgia had no claim to real property situate in Tennessee, but was simply undertaking to prevent the owners of the Tennessee property from permitting fumes and gases from the Tennessee operation to be discharged upon and against plaintiff's property situate in Georgia.

The jurisdiction of this court over the subject matter of the complaint being established, the only remaining relevant issue is the validity of the agreement. Its validity is challenged on several grounds: that it is not a compromise settlement but an attempted bargain and sale; that it is vague and indefinite in that it does not reflect agreement as to allocation or distribution of the proceeds, and that the attorneys did not have authority to sign the agreement on behalf of the defendants. The stipulation declares its own purpose "that all issues between the parties be settled." It bears the caption of this cause. By its terms and in reality it was a compromise settlement. It was a compromise by both sides. The plaintiff agreed to pay a premium above the option price for the abandonment by defendants of the claim that it had breached the lease and for acceleration of the option date to December 15, 1969. The $300,000.00 set in the agreement as the value of the stumps was a compromise of their value claimed by Mr. Dyal as in the neighborhood of $500,000.00. The payment of the compromised value was to be in a compromise manner, payment in a lump sum instead of as provided by the leases when stumps were sold. All of the disputes of the parties, those surrounding the alleged breach of the leases and of the validity of the option to purchase, were compromised and settled by the agreement of Union Camp to pay more than it was obligated to pay under the contracts and of the defendants to execute the transfer of the leased lands under the option at an accelerated date. The lands had been burdened by plaintiff's option to buy since 1941. The agreement to sell, that is to say, the grant of the option was a matter of history. The fact that the option was going to be exercised was, in the light of market developments since 1941, a foregone conclusion. What remained to be bargained about and compromised in this regard was not whether the lands

were going to be sold, but whether they were going to be sold at Mr. Dyal's death or at some earlier date.

The charge of vagueness and indefiniteness is based upon the fact that the settlement agreement itself fails to provide an allocation or distribution of the $900,000.00. This court does not regard the settlement agreement as faulty in this respect. Mr. Dyal said that "he was prepared to talk as to Surrency and the whole title at Surrency . . . (and) that he . . . was prepared to speak for the whole crowd." (Record 313). He, in effect, said that we, the defendants, will convey and you, the plaintiff, will pay to us $900,000.00. He was speaking for the whole crowd and the crowd was to receive the $900,000.00. The entire sum was tendered to all of the defendants, the tender being made to Mr. Corish while he was still counsel of record. This court does not see that there was any necessity that the plaintiff undertake to divide it up or to parcel it out. There were spokesmen for the whole crowd, and these spokesmen being Mr. Dyal and also the defendants' attorneys. The plaintiff could, if paying by check, make one check for the entire sum payable jointly to all of the defendants and their attorneys of record. Since the tender was refused the plaintiff has taken the only remaining available, and entirely sufficient, step of tendering the entire sum into court for the benefit of all defendants. The plaintiff takes the position that, absent some agreement among the defendants for some other allocation, the funds, other than the $150,000.00 to Mr. Dyal for the stumps, should be allocated on the basis of acreage owned by each defendant and the plaintiff has prepared a computation on that basis which computation appears of record as a part of plaintiff's motion for order and judgment filed December 30, 1969. A suggestion has been made by Mr. Corish, former counsel for the defendants, that perhaps a more accurate

method of distribution should take into consideration the amount of rentals being received by each defendant. Present counsel for the defendants suggest that plaintiff's proposed distribution is faulty in that it fails to take into account the fact contended for by them that early option payments of $41,534.39 have heretofore been applied specifically to the 12,900 acre tract. This court finds, however, that all of the early payments except $223.05 were applied, as they should have been, to the entire 28,883.44 acre tract (28,900 acres according to the 2-tract or 3-tract treatment of Mr. Dyal). The only fact appearing in the record which provides for the application of any early payment against the option price of a specific interest in the land is the letter agreement dated January 14, 1963 between Mr. Dyal and the plaintiff as approved by all parties then at interest in all of said lands (Exhibit A-5 to the Complaint), which distributed the proceeds of the grant of an easement to Georgia Power Company covering 14.87 acres in the tract and by which it was provided that a credit of $223.05 "shall be applied against that portion of the purchase price allocable to (Mr. Dyal's) undivided interest in the lands in the event the option to purchase is exercised." In the computation above mentioned credit for the $223.05 was extended across the board to the respective interests of all parties concerned in the total 28,900 acre tract, whereas it should have been limited to the then undivided interest of Mr. Dyal. That undivided interest was in ¼th of 12,900 acres of the whole tract and is now divided and held (5/60th of 12,900 acres) by Mrs. Irene Vaughan Dyal and the remaindermen under the deed abstracted at (viii) of Exhibit D-1 of the Complaint, 5/60th of 12,900 acres by Mrs. Irene Vaughan Dyal and the remaindermen under the deed abstracted at (ix) of Exhibit D-1 of the Complaint and 5/60th of 12,900 acres by J. Edgar Dyal under the deed abstracted at (xi) of Exhibit D-1 of the Com-

plaint. Appropriate adjustments relative to this item have been made and are reflected in the Judgment and Decree entered below. This court is convinced that, absent some agreement among the defendants, and there is no evidence of such an agreement, for some other allocation, the funds, other than the $150,000.00 to Mr. Dyal for the stumps, should be allocated on the basis of the acreage owned by each defendant. Mr. Dyal assigned the rental payments due from the entire tract without reference to the ownership of the several tracts. The stipulation provided for "the purchase by plaintiff from the defendants of the full fee simple title to all the lands" and provided specifically for "premium for acceleration of purchase option, $202,034.39." This premium payment, therefore, must be allocated according to acreage owned by each defendant. The conveyance of the fee through the acceleration of the option would necessarily terminate the payment and receipt of rentals. Those receiving the rental payments must look to the several documents by which the rent was assigned for relief from any loss which they suffer.

There can be no doubt that all persons at the conference definitely intended to arrive at a final binding and dispositive compromise settlement and that when the conference adjourned and the conferees went their separate ways all of them considered that they had consummated such a settlement. The remark made by Mr. Corish to the effect that if the parties did not sign the conveyances "you haven't got a deal" was not even intended by Mr. Corish to raise any doubt as to the fact that the conferees had intended to enter into and had entered into an agreement which all of them at the time of its signing considered to be binding and enforceable. His remark was simply an off-the-cuff, unconsidered speculation on the legal question relating to the mechanics of putting the agreement

into effect, namely, whether or not conveyances would be legally requisite. And, of course, there is no evidence that counsel for the plaintiff or Mr. Kinney, Senior Vice-President of the plaintiff, even heard the remark.

This court is convinced that the attorneys had authority to sign the settlement agreement on behalf of all the defendants. This authority of the attorneys comes from two sources, first, from the fact of the relationship of attorney and client, they being the attorneys of record for all defendants and by virtue of that relationship having the authority to enter into this compromise settlement of the litigation and all issues involved in the litigation; and, second, from the fact that Mr. Dyal was the agent of all of the defendants in this case (except the widow of Milton Dyal, who was represented by Mr. Alaimo, her attorney), and possessed authority to act for them in all matters pertaining to the litigation including the settlement thereof. It so happens that the contract of employment of these attorneys is in the record as copied above and is over the signatures of all of the defendants including the trustees, except only the signatures of Willie Eason Dyal and the five remaindermen, and the letter of employment is addressed to the attorneys as "Attorneys for J. Edgar Dyal", and of course there is no question as to the fact that these attorneys represented all persons who signed the letter of employment. It is clear also that these attorneys represented all of the remaindermen upon express authorization and instruction of Mr. Dyal, and Mr. Dyal, as agent for the remaindermen, had authority to engage counsel for them as well as to speak for them at the settlement conference. Three of these remaindermen testified and it was stipulated that the testimony of the other two would be substantially the same as these three. Mrs. Kay Dyal Miller testified that when process was served upon her she

consulted an attorney who told her that possibly Mrs. Irene Vaughan Dyal would protect her interest and advised her not to appear or take any part in the case; that her attorney assumed that Mrs. Irene Vaughan Dyal would protect her interest and that she was willing for it to take that direction. Mr. Dyal was already looking after this interest by providing counsel to represent all the remaindermen. Ernest G. Dyal testified that when he was served with process he called Smith Dyal who informed him generally what it was about and told him not to worry about it, that he also mentioned it to James Dyal; that he conveyed to another remainderman, Forrest Lee Dyal (whose testimony is outlined below), the message he had received from Smith Dyal and that thereupon Forrest Lee Dyal did the same as he did. This witness, Ernest G. Dyal, testified further that he did not know that he was named in the deed from Mr. Dyal to Mrs. Irene Vaughan Dyal as a contingent remainderman until he received some correspondence from counsel for plaintiff; that he did not know he was so named until he received summons of suit. He did not know whether his brother, Forrest Lee Dyal, knew that he was named in the deed or not and that his sister, Barbara Dyal Robinson, had no knowledge about it; that he did not know whether his sister, Mrs. Kay Dyal Miller, knew about being named in the deed or not; that he had not seen his present attorney in this case until yesterday (April 13, 1970) for the first time; that when he discussed the matter with James Dyal, James told him that they were in litigation with Union Camp—about the same thing that Smith had told him, and that they had employed counsel; that they told him not to worry about it and he did not worry about it, and he acted on what they told him and assumed that they were taking care of it. Forrest Lee Dyal testified that when he was served with summons and complaint he called his brother Ernest

G. Dyal, who told him not to worry about it, that Ernest G. Dyal had contacted Smith Dyal "and they would take care of it"; that he first learned that he had a contingent interest in a small portion of this Dyal Surrency tract when he was served with the paper and that after he telephoned his brother Ernest G. Dyal and was told what he was told he was content to let it stay that way. Under these circumstances, including the fact that the other two remaindermen (Mrs. Barbara Dyal Robinson and Mrs. Hilja Stranden Lahde) did not testify and the stipulation that their testimony would be substantially the same as that of the three who did, and the circumstance that one of the remaindermen is the housekeeper of Mr. and Mrs. Dyal, it seems clear that these remaindermen were relying upon the other defendants in the case to protect the relatively small contingent interest they had and that Mr. Dyal was fully authorized to engage counsel for them and to settle for them. Even if it were otherwise, that is to say, even if it were true that neither the attorneys nor Mr. Dyal had authority to settle for these remaindermen, nevertheless, the settlement agreement would be binding upon Mr. Dyal who certainly had authority to settle for himself and upon his wife, sons and daughters for whom he also had such authority. "[A] valid compromise may be made by any parties between whom a controversy as to their respective rights exists." 15A C.J.S. Compromise and Settlement, § 6, page 181. The above mentioned letter of employment, after identifying the litigation, says: "This will serve to authorize you to file such pleadings and *to take such steps* as you deem necessary to protect our interests in this litigation." (Emphasis added).

Pretermitting the question as to where the contract retaining counsel was entered into (Mr. Dyal doubtless retained Mr. Murrell in Florida; Mr. Murrell then asso-

ciated Mr. Corish in Savannah, Georgia; then the other defendants who signed the letter of September 5, 1969, presumably signed it in Georgia, except as to Mrs. Dyal, who doubtless signed it in Florida, and it is addressed to and in some manner was delivered to Mr. Murrell and Mr. Corish either in Miami at the office of Mr. Murrell, or in Savannah, Georgia at the office of Mr. Corish), it is clear that counsel's engaged services were to be rendered in Georgia where the suit was pending and it is clear also that the compromise settlement agreement, while entered into in Florida, was to be performed in Georgia, and that accordingly both agreements must be construed in accordance with the laws of Georgia. Georgia Code Sections 102-103, 102-110; *Vanzant* v. *Arnold*, 31 Ga. 210 (1860) and *Goodwin* v. *Nadler*, 113 Ga. App. 493 (1966). Under both statutory and decision law in Georgia attorneys have authority to bind their clients "by any agreement in relation to the cause, made in writing." See Ga. Code § 9-605. An attorney's authority insofar as the court and the other party is concerned is 'plenary". *City of Atlanta* v. *Frank*, 120 Ga. App. 273, 275 (1969). The last cited case only confirms the law of Georgia as expressed by the Supreme Court in the case of *Elliott* v. *Elliott*, 184 Ga. 417 (1937), holding that a "consent verdict and decree resulting from an agreement of compromise between the attorneys and the parties will not be set aside in equity for want of authority of the attorney for one of the parties to enter into such an agreement, or for fraud that is not attributable to the opposite party." Nor can it be successfully contended that since the settlement agreement called for the conveyance of real estate the statute of frauds required the authority of the agent or attorneys signing the agreement to be in writing. The consent verdict complained of in the *Elliott* case as having been agreed upon without authority called for the cancellation of a deed and *Fulford* v.

Fulford, 225 Ga. 9 (1969) holds that a compromise settlement of pending litigation containing a promise to convey realty is not required to be in writing. Thus the defendants are bound by the settlement agreement because it was entered into by their attorneys of record and this would be true even if Mr. Dyal had not attended the conference, but since he did attend and gave personal direction to the conference and directed the defendants' attorneys in their execution of the stipulation agreement said attorneys were thus acting on dual authority, that which they possessed by virtue of their unrestricted contracts of employment and the authority of Mr. Dyal as a party and titleholder of an undivided share of the leased lands and his authority as an agent of the other parties and titleholders.

The authority granted Mr. Dyal was not made express by the other parties, that is he had no written power of attorney. A written power of attorney is not necessary in order for an agent to have actual authority. It is not surprising that Mr. Dyal, the head of the family, though having full authority from all of them to act for them with respect to their varying interests acquired by gift from him, held no written powers of attorney. Such legal evidence of authority had never been found appropriate or required in prior dealings by him on their behalf with Union Camp with respect to these lands and these interests. For more than 28 years in both formal and informal agreements made to supplement the original leases Mr. Dyal made the agreements with Union Camp on behalf of all the titleholders subsequently securing their signatures where the record title was involved. Not once in 28 years of experience under the leases was his authority to act on their behalf questioned. Evidence of strained relations existing in the family of Mr. Dyal was offset by evidence

that on August 3, 1969 the family had composed their differences as far as Union Camp was concerned. No other conclusion is to be drawn than that the family united behind their father in his action against Union Camp in the Florida court, and that as in the past 28 years he had their actual authority to make an agreement on their behalf with Union Camp relating to these lands. As Mr. Corish, former counsel for the defendants in this case, testified by deposition (page 43), "Edgar was the alter ego of the Dyal family always." Moreover, if Mr. Dyal did not have actual authority of the other defendants, and this court is convinced and finds that he did, he possessed apparent authority to bind them to the terms of the stipulation of November 5, 1969. This apparent authority stemmed from the entire history of his having handled with Union Camp for the entire family all negotiations with respect to the property for 28 years, and also from the circumstances immediately surrounding the holding of the Miami conference which resulted in the agreement as well as from his corroborating declarations to the conference that he possessed authority from all the titleholders.

All of the parties attending the Miami settlement conference gathered there at Mr. Dyal's request with the understanding that the defendants' representatives would be authorized to convey the title to all of the leased lands. Union Camp was interested in acquiring the Fargo lands in addition to the Surrency lands. At the conference Mr. Dyal denied any authority to speak as to the Fargo lands but declared that "he could speak for the rest of the family as to Surrency." (Mr. Corish's deposition, page 17). After extended negotiations by the attorneys the agreement was finally reached, and, as above pointed out, was handwritten by the attorney for Union Camp, read by Mr. Dyal, then typed and read again by Mr. Dyal, who this time insisted

upon a change. The stipulation was re-typed in its final form and Mr. Dyal read it again. When asked by his attorney if the attorneys should sign the agreement his answer at first was equivocal. The attorneys insisted upon unequivocal directions. Mr. Dyal then gave specific directions that the agreement be signed by both attorneys for the defendants. They signed the agreement under his direction and in his presence together with the attorneys for Union Camp and the attorney for the widow of Milton Dyal.

If any of the other defendants placed any limitations on the actual authority of Mr. Dyal[2] such limitations were never revealed to plaintiff, and the other defendants as well as Mr. Dyal are nevertheless bound by the terms of the agreement. Under Georgia law applicable here when an agent exceeds his actual authority the principal is bound by the apparent authority conferred upon the agent. *Gilmore* v. *Royal Indemnity Co.*, 240 F. 2d 101, 105 (5th Cir. 1957); *Folsom* v. *Miller*, 102 Ga. App. 232 (1960).

Under the law of Georgia this agency and authority of Mr. Dyal may be established by the apparent authority derived from the 28 years of prior transactions in which Mr. Dyal acted as the agent for all the owners including the trustees. In *Noble* v. *Burney*, 124 Ga. 960, 964 (1906), the Supreme Court of Georgia quoted with approval:

> " 'It is true that agency may be proved from the habit and course of dealing between the parties, that is, if one has usually or frequently employed another to do certain acts for him, or has usually ratified such acts when done by him, such person becomes his implied agent to do such acts.' "

---

2. This court is convinced and finds that no such limitations were imposed.

Finally, the law of Georgia permits evidence of the declarations of the agent made outside of court to corroborate the agency established prima facie by circumstances of the conference and the prior history of Mr. Dyal's agency for all the owners. In *Bell* v. *Washam*, 82 Ga. App. 63, 65 (1950), the court said:

> "[M]ere declarations of one outside of court cannot in the first instance be received to establish agency, but after a prima facie case is otherwise made or ratification shown such a declaration may be admitted in evidence in corroboration of other evidence tending to prove agency."

Accordingly, Mr. Dyal's statement at the settlement conference that he was prepared to talk as to Surrency and the whole title of Surrency, and that he was prepared to speak for the whole crowd constitutes material evidence as to his actual authority. And it constitutes evidence of a high order. He was doubtless more familiar with the entire situation than any other person. He was fresh from conferences with other members of the family. He knew just what they had said and what he had said to them. He knew the entire history. He knew all the circumstances. He said in effect that he had the authority. All persons present took him at his word and were convinced that he had it. In the light of all of the evidence in this case this court would find it difficult to discount that statement.

ORDER, JUDGMENT AND DECREE

Whereupon it is hereby ORDERED, ADJUDGED and DECREED that each of said defendants other than Willie Eason Dyal shall specifically perform their respective agreements by the execution and delivery to plaintiff of sufficient deeds of conveyance to all their interests in the lands or

any part thereof as covered by and described in said stipulation, to wit:

> "the 28,833.44 acres of timberland lying in Appling and Wayne Counties, Georgia, as set forth and described in that certain Indenture dated as of December 30, 1941, between James E. Dyal, as Lessor, and Union Bag & Paper Corporation, as Lessee, as recorded in Deed Book 51, Folios 583-594, inclusive, of the records in the Office of the Clerk of the Superior Court of Appling County, Georgia, as of December 31, 1941, and in Deed Book 57, Folios 555-563, inclusive, of the records in the Office of the Clerk of the Superior Court of Wayne County, Georgia, as of January 12, 1942 (the same being the Indenture set forth as Exhibit A of Plaintiff's Complaint), and the approximately 10,400 acres of timberland lying in Appling and Wayne Counties, Georgia, as set forth and described in that certain Indenture dated as of December 31, 1941, between The Citizens and Southern National Bank, as Trustee for Mrs. Elizabeth Dyal Sammons, et al., as Lessor, and Union Bag & Paper Corporation, as Lessee, as recorded in Deed Book 52, Folios 1-6, inclusive, of the records in the Office of the Clerk of the Superior Court of Appling County, Georgia, as of December 31, 1941, and in Deed Book 57, Folios 564-569, inclusive, of the records in the Office of the Clerk of the Superior Court of Wayne County, Georgia, as of January 12, 1942 (the same being the Indenture set forth as Exhibit B of Plaintiff's Complaint), and reference to each of which Indentures and the records thereof is hereby expressly made for a full and complete description of the lands herein ordered to be conveyed, but, nevertheless, excepting therefrom such liens or encumbrances thereon or conveyances therefrom as now

held by persons not parties to this action and which may have been made or suffered by Union Bag & Paper Corporation and its successors in title and/or interest, including the Plaintiff;"

so as to vest in plaintiff the entire legal title to the said lands as described in said stipulation within thirty (30) days from the date of this order and in the event said defendants other than Willie Eason Dyal, shall fail, neglect or refuse to execute and deliver to the plaintiff such deeds of conveyance within such time, then and in that case this judgment shall stand and be a good, sufficient and complete conveyance from the said defendants to the plaintiff of all right, title and estate of said defendants in and to said real estate and shall be taken and held as good, complete and perfect deeds of conveyance as would be the deeds of conveyance hereinbefore specified; and the Clerks of the Superior Courts of the Counties wherein said lands lie and are situate will enter the same upon all registers of mesne conveyances in their respective offices.

And it is FURTHER ORDERED, ADJUDGED and DECREED that the respective shares of the defendants in the $900,000.00 tendered by the plaintiff and due the defendants under said Stipulation shall be according to their undivided interests in the realty hereinabove ordered conveyed to the Plaintiff as follows:

A. The 28,900 acres of Exhibit A with an adjusted option price of $391,965.61:

(1) The 12,900-acre portion

Defendant	Option Price	Premium	To
(a) Willie Eason Dyal: 9/60 interest in 12,900 acres (Paragraph 7(2) of Complaint)	$26,258.99	$9,947.49	$36,2
(b) James E. Dyal, Jr.: 9/60 interest in 12,900 acres (Paragraph 7(2) of Complaint)	$26,258.99	$9,947.49	$36,2
(c) Charles Smith Dyal: 9/60 interest in 12,900 acres (Paragraph 7(2) of Complaint)	$26,258.99	$9,947.49	$36,2
(d) Dorothy Dyal Briscoe: 9/60 interest in 12,900 acres (Paragraph 7(2) of Complaint)	$26,258.99	$9,947.49	$36,2
(e) Elizabeth Dyal Sammons: 9/60 interest in 12,900 acres (Paragraph 7(2) of Complaint)	$26,258.99	$9,947.49	$36,2
(f) Irene Vaughan Dyal and the several remaindermen named: 10/60 interest in 12,900 acres (Paragraph 7(2) of Complaint)	$29,034.66	$11,052.77	$40,0
(g) James Edgar Dyal: 5/60 interest in 12,900 acres (Paragraph 7(2) of the Complaint)	$14,507.33	$5,526.38	$20,0
	$174,836.94	$66,316.60	$241,1

(2) The 16,000-acre portion

James Edgar Dyal: 16,000 acres (Paragraph 1(1) of Complaint)	$217,128.67	$82,253.21	$299,3
Sub Total	$391,965.61	$148,569.81	$540,5

B. The 10,400 acres of Exhibit B with the original option price of $156,000.00:

James E. Dyal, Jr., and Charles Smith Dyal as Substitute Trustees under Deed of Trust of James E. Dyal dated December 15, 1941: 10,400 acres (Paragraph 5 of Complaint)	$156,000.00	$ 53,464.58	$209,4
	$547,965.61	$202,034.39	$750,0
James Edgar Dyal: 1/2 interest in stumps			$150,0
Total consideration in Stipulation			$900,0
Less pro rata part due Willie Eason Dyal (paid $36,191.55)			$36,2
Amount due remaining Defendants			$863,7

*Willie Eason Dyal is due from the funds in Court the $14.93 resulting from the underpayment above shown.

COPY FOUND

And it is FURTHER ORDERED, ADJUDGED and DECREED that, the proceeds of the 10/60 undivided interest of IRENE VAUGHAN DYAL in and to the 12,900-acre tract as above described shall be and is hereby impressed with a trust for the contingent remaindermen as their interests appear in a deed of conveyance from James Edgar Dyal to Mrs. Irene Vaughan Dyal dated March 7, 1965 as recorded in Deed Book 122, folio 254 of the Appling County Deed Records and in the deed of gift from James Edgar Dyal to Mrs. Irene Vaughan Dyal dated March 25, 1966, as recorded in Deed Book 122, folio 290 of the Appling County Deed Records; that the right to the accumulated interest on the sum of $863,808.45 deposited in designated banks with the consent of the Plaintiff and Defendants and on approval of the Court shall be according to the same respective shares appearing in the distributive shares of the proceeds above decreed; and that all such sums shall remain on deposit at interest pending further proceedings herein and order of this Court.

There being more than one claim for relief presented in this action and multiple parties being involved this court hereby enters the above as a final judgment as to all matters adjudicated therein and hereby makes an express determination that there is no just reason for delay and hereby gives and makes express direction for the entry of the foregoing judgment as a final judgment of all matters covered thereby, this determination and direction being made in accordance with the provisions of Federal Rule of Civil Procedure 54(b).

This 2nd day of March, 1971.

/s/ W. A. Bootle
Chief Judge

CLOSE IN CENTER

APPENDIX D

"UNION CAMP CORPORATION, :

Plaintiff, :

vs. :

"JAMES E. DYAL, et al., :

Defendants. :

CIVIL ACTION NO. 966

"STIPULATION

"It is stipulated between the Plaintiff and the Defendants in the above and foregoing case that all issues between the parties be settled by and through the purchase by Plaintiff from the Defendants of the full fee simple title to all the lands covered by and described in the two (2) leases held by Plaintiff, set forth at "Exhibit A" and "Exhibit B" of the original Complaint, at and for a total purchase price of $900,000.00, composed of the following items, viz.: Option purchase price of $547,965.61; ½ interest in stumps of ($300,000.00), $150,000.00, and premium for acceleration of purchase option, $202,034.39.

"Defendants are to execute and deliver to Plaintiff all deeds of conveyance necessary to convey said fee simple title to said lands to Plaintiff against payment of said sums, and at which time the obligations of Plaintiff to Defendants under the terms of said lease shall terminate with the merger of the lease-hold estates with the title as so conveyed.

"Consummation of said settlement shall be made at the offices of Bouhan, Williams & Levy, Attorneys for

Plaintiff, at Savannah, Georgia, on or before December 15, 1969, or as soon thereafter as possible.

"At Miami, Florida, November 5, 1969.

"/s/ John M. Murrell
/s/ A. Alaimo
/s/ Julian F. Corish
Counsel for Defendants
/s/ George W. Williams
Counsel for Plaintiff"

APPENDIX E

"September 5, 1969
"Mr. John M. Murrell and
Mr. Julian F. Corish
Attorneys for J. Edgar Dyal
1101 Brickell Avenue
Miami, Florida 33131

"Gentlemen:

"We, the undersigned, are named as defendants in a certain Civil Action, number 966, filed by Union Camp Corporation as plaintiff, in the District Court of the United States for the Southern District of Georgia, Brunswick Division.

"This will serve to authorize you to file such pleadings and to take such steps as you deem necessary to protect our interests in this litigation.

"Very truly yours,

"/s/ James E. Dyal, Jr.
James E. Dyal, Jr., individually and as surviving Substitute Co-Trustee under a Trust Deed dated December 15, 1941

"/s/ Charles Smith Dyal
Charles Smith Dyal, individually and as surviving Substitute Co-Trustee under a Trust Deed Dated December 15, 1941

"
.....
Mrs. Willie Eason Dyal, Individually and as Administratrix of the Estate of Milton Dyal, Deceased

"/s/ James E. Dyal
James E. Dyal

"/s/ Mrs. Irene Vaughan Dyal
Mrs. Irene Vaughan Dyal

"/s/ Mrs. Elizabeth Dyal Sammons
Mrs. Elizabeth Dyal Sammons

"/s/ Mrs. Dorothy Dyal Briscoe
Mrs. Dorothy Dyal Briscoe"

COPY

FILED
JUL 3 1972
E. ROBERT SEAVER, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1600

UNION CAMP CORPORATION,
Petitioner,

vs.

JAMES E. DYAL, JR., et al., JOHN M. MURRELL, et al., and LEON A. WILSON, II, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
I. Under Georgia law an agent without written authority of his principal may not contract for the conveyance of lands of the principal, even under the guise of compromise, and settlement of litigation wherein the title to the lands are not in dispute, and the principal neither authorizes, approves, nor ratifies such action	4
II. The law of Georgia does not empower attorneys with written authority from their clients "to take such steps as you deem necessary to protect our interests in this litigation" to contract, in compromise and settlement of litigation or otherwise, for the conveyance of lands of the client, where the title to the lands are not in dispute, and the client does not authorize, approve or ratify the action	9
III. The rule that courts should favor compromise does not require enforcement of unauthorized and unwanted commitments by others to sell real property owned by the clients	12

INDEX (cont.)

Page

IV. The "clearly erroneous" rule does not require a reviewing court to accept the conclusions reached by the trial court from the facts as found 13

CONCLUSION 15

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES CITED

Case	Page
Boswell v. Gillen, 131 Ga. 310, 62 S.E. 187 (1908)	8
Cord v. Smith, 338 F.2d 516 (9th Cir. 1964)	10
Davis v. First National Bank of Blakely, 139 Ga. 702, 78 S.E. 190 (1913)	11, 12
Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)	9
Fulford v. Fulford, 225 Ga. 9, 165 S.E.2d 848 (1969)	4, 6, 7, 8
Sperry v. Florida, 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed.2d 428 (1963)	10
Wade v. Powell, 31 Ga. 1 (1860)	10

RULES

Fed.R.Civ.P.:	
Rule 52	13

in the
Supreme Court
of the
United States

OCTOBER TERM, 1971

NO. 71-1600

UNION CAMP CORPORATION,

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JAMES E. DYAL, JR., et al., JOHN M. MURRELL, et al., and LEON A. WILSON, II, et al.,

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The history of the relationship among the parties, and the facts involved are extensively recited in the decision of the Court of Appeals for the Fifth Circuit (A. 1-21), and in the decision of the District Court (A. 23-57).

This is a diversity of citizenship action for a declaratory judgment and for the payment of inverse damages to redeem against a forfeiture of two 99 year timber land leases, containing options to purchase the lands exercisable in the future. The action was filed in the Southern District of Georgia by Union Camp Corporation, as lessee, against twelve defendants, as lessors. Union Camp caused a temporary restraining order to issue restraining the defendants from interfering with its possession of the lands; restraining the defendant, J. Edgar Dyal, from prosecuting an action then pending in the Southern District of Florida for breach of the leases, damages, and forfeiture; and restraining the defendants, parties to an action then pending in Appling County, Georgia, from prosecuting the action challenging the validity of the options to purchase the lands. The latter action was in the process of voluntary dismissal when the Union Camp suit was filed.

With the action in the posture noted, the Executive Vice President and the attorney for Union Camp met in Miami, Florida, with counsel for the defendant, Willie Eason Dyal, counsel for six other defendants, who held written authority to "take such steps as you deem necessary to protect our interests in this litigation", and with the defendant, J. Edgar Dyal, whose authority to represent the other defendants was oral. J. Edgar Dyal announced at the meeting that he was not authorized to discuss other lands under lease from the defendants to Union Camp (known as the Fargo Tract), which are not involved in this litigation, but that he was authorized to "speak" for the whole title of the lands involved, which are known as the Dyal #1, or Surrency Tract.

After extensive negotiations, the parties present and counsel agreed to a settlement amount for the damage claim of J. Edgar Dyal, and agreed that all defendants would convey their fee interests in the Surrency Tract to Union Camp for the price fixed in the option to purchase, plus an additional sum as premium for acceleration of purchase option. The agreement was reduced to writing and signed by counsel. The defendant, Willie Eason Dyal, also agreed to convey her fee interests in the Fargo Tract to Union Camp for an agreed sum, plus an additional sum for her attorneys' fee; and has since fully performed her agreements by conveying her interests in the Surrency and Fargo Tracts to Union Camp.

After the meeting, J. Edgar Dyal, became dissatisfied with the stipulation and notified his counsel he did not intend to carry it out. He and his counsel immediately thereafter notified Union Camp and its counsel of his intention. All other defendants have repudiated the stipulation of counsel and object to its enforcement.

Upon failure of the eleven defendants to perform in accordance with the stipulation, Union Camp moved to enforce the stipulation. After an extensive evidentiary inquiry, the District Court ordered that the stipulation be enforced against the eleven defendants (App. A. 23-57). On appeal by the eleven defendants, the Court of Appeals for the Fifth Circuit (App. A. 1-21) affirmed the order requiring enforcement of the stipulation against the defendant, J. Edgar Dyal, and reversed the order as being unenforceable against the remaining ten defendants.

Union Camp petitions for a writ of certiorari to review the decision of the Court of Appeals. The defendants, except Willie Eason Dyal, respond here in opposition.

REASONS FOR DENYING THE WRIT

I. Under Georgia law an agent without written authority of his principal may not contract for the conveyance of lands of the principal, even under the guise of compromise and settlement of litigation wherein the title to the lands are not in dispute, and the principal neither authorizes, approves, nor ratifies such action.

Union Camp asserts the holding (that an agent's compromise settlement of a pending action which provides for the conveyance of real property must be in writing unless ratified by the principal) is in conflict with the law of the State of Georgia. In support of its assertion, Union Camp contends that the Court of Appeals misinterpreted the decision of the Supreme Court of Georgia in the case of *Fulford v. Fulford*, 225 Ga. 9, 165 S.E.2d 848 (1969) on this point.

Union Camp's assertion is miscast, and its contention is in error.

The Court of Appeals characterized the stipulation, as follows:

> "The stipulation did not purport merely to settle the law suit. It neither confirmed the validity of the leases and the option, nor declared their invalidity. It was silent as to all other issues raised in this litigation except Dyal's request to share in the stumpage based on a compromise as to value. In no other way did it compose the issues by determining some of them in favor of one party and others in the favor of another. It did not provide for a cash payment to

dispose of some of the contentions made. Instead, as it recites, it settled *all issues* between the parties, not merely those in litigation.

> "When the conference was arranged, counsel for Union Camp promised that one of its officers who could speak authoritatively for the company would attend, but it agreed to participate only on condition that the persons representing the Dyal interests 'were prepared to speak for the whole title and deliver titles to the whole property of Surrency No. 1.' That was the purpose and the result of the conference."
>
> (App. A. 11)

The Court held that the stipulation provided for the transfer of title to real property situated in Georgia, and thus the District Court was obliged to follow the Georgia law in determining the validity and effect of the stipulation, as well as the power of agents to execute it.

The basic rule of law in Georgia was correctly noted, as follows:

> "A Georgia statute gives attorneys 'authority to bind their clients in any action or proceedings, by any agreement in relation to the cause, made in writing, . . .' Ga. Code 9-605. But the stipulation in this case was not an agreement 'in relation to the cause.' Nor was it a settlement that disposed of the issues in the proceeding. Cf. *Ingalls v. Ingalls*, N.D. Ala. 1959, 177 F.Supp. 151, Cir. 1960, 280 F.2d 423; *Cia Anon Venezolana De Navegacion v. Harris*, 5 Cir. 1967, 374 F.2d 33. It was a contract to sell lands.

"A contract for the 'sale of lands, or any interest in, or concerning them,' Ga. Code 20-401 §(4)4, 'must be in writing, signed by the party to be charged therewith, or some person by him lawfully authorized. . . .' *Id.* at 201-401. To implement this statute of frauds, Ga. Code 4-105 provides, 'the Act creating the agency shall be executed with the same formality . . . as the law prescribes for the execution of the act for which the agency shall be created.' This evidently requires that the agent's power to sell land must be in writing absent later ratification of his acts, *Baxley Hardware Co. v. Morris*, 1927, 165 Ga. 309, 140 S.E. 869, or estoppel of his principal to deny his authority. See *Wade v. Powell*, 1860, 31 Ga. 1; *Fulford v. Fulford*, 1969, 225 Ga. 9, 165 S.E.2d 848. . . ."

(App. A. 12, 13)

The Court reviewed the cases in Georgia following the rule that written authority to the agent must be shown to support his sale or lease of the principal's lands and that one dealing with such agent is charged with knowledge of the rule and is under a duty to inquire and ascertain whether such written authority exists. It then proceeded to consider whether the exception to the rule followed in *Fulford v. Fulford*, *supra* at page 4, applies in the instant case.

Fulford involved an action among members of the same family, which under Count 1 sought to set aside a conveyance of lands by one of the members to another. Count 2 was described as follows:

> "It was alleged in this court that on March 29, 1967, while the instant case was pending, all of the parties with their counsel met in the courtroom of the Wheeler County courthouse and made an agreement which was an accord and satisfaction (compromise settlement) of the action referred to in Count 1 . . ."
>
> (165 S.E.2d 848, 852)

Count 2 sought to enforce the oral agreement providing, among other things, for the reconveyance of the lands in issue. On this point the Court held:

> "'. . . The compromise of a contention as to the property rights, the final outcome of which, if settled by litigation, the parties consider to be doubtful, furnishes a consideration sufficient to support the compromise contract. It is well settled that in equity the termination of family controversies affords a consideration which is sufficient to support a contract made for such purpose.' Belt v. Lazenby, 126 Ga. 767, 56 S.E. 81. . . ."
>
> (165 S.E.2d 848, 853)

and

> "'Where an agreement for the compromise of a pending cause is made by a party and his counsel on the one hand, and by counsel of the opposite party and ratified by his client, whereby one of the parties is to do certain acts, such agreements upon performance or offer to perform according to its terms within a reasonable time, becomes

> binding on the parties, and puts an end to the original subject-matter of the controversy * * * Such an agreement need not be in writing. . . .'"
> (165 S.E.2d 848, 854)

citing, *inter alia*, *Boswell v. Gillen*, 131 Ga. 310, 62 S.E. 187 (1908).

The Court of Appeals, in its decision now under attack, distinguished *Fulford* from the instant case thus:

> ". . . The Court's opinion quoted with approval an earlier observation that the requirement of a written power of attorney be in writing has 'no application to an oral agreement and compromise of a pending suit. . . .' In *Fulford*, however, title to the property was at issue in the litigation, and all the parties expressly ratified their attorney's settlement. That, too, was the basis for enforcing the stipulation by counsel in a land dispute, *Dean v. Jackson*, 1964, 219 Ga. 552, 134 S.E.2d 601, where the court found that the client gave express assent to the action taken by his attorney."
> (App. A. 15)

The Court of Appeals noted that in the instant case the stipulation was not an agreement "in relation to the cause". "Nor was it a settlement that disposed of the issues in the proceedings. . . . It was a contract to sell lands." (App. A. 12). "There is no evidence that the Dyal family (the ten defendants) desired him (J. Edgar Dyal) to sell their interests in the land." (App. A. 16). "Here there can be no question of ratification or delay on the part of any of the Dyals after the stipulation was signed." (App.

A. 13). "The sale of Surrency was not incidental or reasonably necessary to settling the litigation. Indeed the reverse is true: the litigation was incidental to ownership of the fee. . . ." (App. A. 16).

The Court of Appeals correctly interpreted the decision in *Fulford*, and followed it by ordering the stipulation enforced against J. Edgar Dyal, who "expressly authorized his lawyers to execute the stipulation"; and "ratified it by acquiescing in it after it was signed." (App. A. 19). The Court of Appeals correctly interpreted the decision in holding the exception does not apply to the other defendants, and followed the basic rule, in ordering:

> "As to all the defendants, other than J. Edgar Dyal and Mrs. Willie Eason Dyal, the suit may continue. Determination of their rights will abide the outcome of the litigation."
>
> (App. A. 21)

The decision of the Court of Appeals fully accords with the law of Georgia.

II. The law of Georgia does not empower attorneys with written authority from their clients "to take such steps as you deem necessary to protect our interests in this litigation" to contract, in compromise and settlement of litigation or otherwise, for the conveyance of lands of the client, where the title to the lands are not in dispute, and the client does not authorize, approve or ratify the action.

In passing we question whether the rule in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) compels that, in diversity of citizenship cases

in Georgia, attorneys admitted to practice in the United States courts, who are also admitted to practice in the state courts of Georgia, come into federal courts cloaked with the plenary powers of attorneys of record in the courts of Georgia. See: *Sperry v. Florida*, 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed.2d 428 (1963) and *Cord v. Smith*, 338 F.2d 516 (9th Cir. 1964).

Even the plenary powers of attorneys of record in Georgia do not rise to the heights suggested by the petitioner. Union Camp asserts that Georgia law vests plenary power in attorneys of record to permit them to agree to convey lands of their clients, without the consent of their client, unless the opposing counsel is advised of an express limitation in the contract of employment restricting the attorney from so agreeing. The assertion is overbroad.

The plenary power of attorneys of record in Georgia under a general retainer contract is limited. These powers are limited to the scope of the action in which they are retained to represent their client. In *Wade v. Powell*, 31 Ga. 1 (1860), at page 22, it was said: "(a)n attorney may confess a judgment against his client, and this involves every thing." As the Court of Appeals noted: "(a) Georgia statute gives attorneys 'authority to bind their clients in any action or proceedings, by any agreement in relation to the cause, made in writing, . . .' Ga. Code 9-605." (App. A. 12).

Had the defendants' attorneys confessed judgment in this declaratory judgment action by Union Camp, as lessee, against the defendant, as lessors, the title to the lands would not be adversely affected, but would be reaffirmed in the defendants. The Court of Appeals held, as follows:

"The stipulation did not purport merely to settle the law suit. It neither confirmed the validity of the leases and the option, nor declared their invalidity. . . . Instead, as it recites, it settled *all issues* between the parties, not merely those in litigation."

(App. A. 11)

". . . But the stipulation in this case was not an agreement 'in relation to the cause.' Nor was it a settlement that disposed of the issues in the proceedings. (Citations omitted.) It was a contract to sell lands."

(App. A. 12)

and noted:

"The lawyers representing the Dyals never purported to act on their own authority as lawyers, express or implied. They made it clear in the presence of Union Camp's representatives that they were seeking authorization from J. Edgar Dyal, and would sign only if he instructed them.

". . . But Dyal's authority was more tenuous than the lawyers'; they at least had a written letter of employment. His authority was purely oral." (App. A. 15)

The case at bar falls squarely within the limitations noted by the Court in *Davis v. First National Bank of Blakely*, 139 Ga. 702, 78 S.E. 190 (1913), related by petitioner in brief at page 15, wherein the Court held that the statute:

> ". . . does not mean that when a client employs an attorney to bring or defend a suit, it ceases to be the client's litigation, that he has no power to say whether he will litigate or compromise his suit, and that the attorney becomes the owner or absolute master of the litigation, so as to be able to sell or give away his client's property rights by contract, in spite of his client."
>
> (139 Ga. 702, 710, 78 S.E. 190, 194)

III. The rule that courts should favor compromise does not require enforcement of unauthorized and unwanted commitments by others to sell real property owned by the clients.

Compromises of disputed claims are favored by the courts where the parties acting in good faith settle a controversy.

Courts favor compromise, but not at the expense of forcing an unwanted sale of their real property, the title to which is not in controversy, upon unwilling parties to litigation who neither participated in the negotiations nor authorized, approved nor ratified the stipulation.

In the decision *sub judice*, the Court of Appeals has ordered the stipulation enforceable against J. Edgar Dyal, the only party defendant who authorized it; and has ordered the stipulation unenforceable against the ten defendants who neither participated in the negotiations, nor authorized, approved nor ratified the stipulation.

IV. The "clearly erroneous" rule does not require a reviewing court to accept the conclusions reached by the trial court from the facts as found.

Petitioner contends that the failure of the Court of Appeals to follow findings of fact held not to be clearly erroneous is in disregard of Rule 52, Fed.R.Civ.P. and warrants this Court's review under its power of supervision. Petitioner is in error. The Court of Appeals accepted the facts but disagreed with the conclusion reached therefrom by the trial court, stating:

> "The trial court concluded also that Dyal was in fact 'the agent of all the defendants in this case' except Mrs. Willie Eason Dyal, and 'possessed authority to act for them in all matters pertaining to the litigation including the settlement thereof.' But Dyal's agency was more tenuous than the lawyers'; they at least had a written letter of employment. His authority was purely oral.
>
> "While the evidence with respect to Dyal's actual authority is contradictory, we are not left with the firm conviction that the trial court's finding was clearly erroneous. (Citations omitted.) But the conclusion reached from this fact does not follow: because J. Edgar Dyal had authority to settle the law suit does not mean that he had power to agree to convey a fee interest in the real property. . . . There is no evidence that the Dyal family desired him to sell their interests in the lands. . . .

"The sale of Surrency was not incidental or reasonably necessary to settling the litigation. Indeed the reverse is true: the litigation was incidental to ownership of the fee. Nor does authority to sell a fee in real property usually accompany authority to negotiate for settlement of the type of claim the Dyals were presenting. Authority to act in the principal's business does not usually imply authority to sell the principal's interest in lands. Restatement of Agency 2d §52(b). Dyal's acts suffer from the same defects as his counsels': he acted beyond his authority, and he agreed to convey lands without written authority from his principals. Indeed it does not appear that he had even oral authority to do so."

(App. A. 15, 16)

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Dated at Miami, Florida, this 30th day of June, 1972.

DON G. NICHOLSON

THOMAS G. SPICER

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CERTIFICATE OF SERVICE

I, THOMAS G. SPICER, one of the attorneys for JAMES E. DYAL, JR. and CHARLES SMITH DYAL, each individually and both as surviving Substitute Co-Trustees under a Trust Deed dated December 15, 1941, JAMES E. DYAL, MRS. IRENE VAUGHAN DYAL, MRS. ELIZABETH DYAL SAMMONS, MRS. DOROTHY DYAL BRISCOE, ERNEST EUGENE DYAL, FORREST LEE DYAL III, MRS. BARBARA DYAL ROBINSON, MRS. KAY DYAL MILLER, and MRS. HILJA STRANDEN LAHDE, Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 30th day of June, 1972, I served three copies of the foregoing BRIEF IN OPPOSITION on each other party separately represented in the proceeding, by mail in a duly addressed envelope, with air mail postage prepaid, to counsel of record as follows: To: George W. Williams, Attorney for Union Camp Corporation, Bouhan, Williams & Levy, 47 Bull Street, Savannah, Georgia 31402. To: Anthony A. Alaimo, Attorney for Mrs. Willie Eason Dyal, individually and as Administratrix of the Estate of Milton Dyal, deceased, Alaimo & Taylor, 1803 Norwich Street, Brunswick, Georgia 31521. To: Malberry Smith, Jr., Attorney for John M. Murrel and Julian F. Corish, Corish, Smith & Remler, P.O. Box 8123, Savannah, Georgia 31402. To: Leon A. Wilson II, *pro se.*, Albany Avenue, Waycross, Georgia. To: C. Edwin Rosier, *pro se.*, P.O. Drawer 1327, Waycross, Georgia.

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